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# THE DANGEROUS WORLD OF INDEFINITE DETENTIONS: VIETNAM TO ABU GHRAIB

*Jennifer Van Bergen<sup>†</sup> and Douglas Valentine<sup>††</sup>*

## I. INTRODUCTION<sup>1</sup>

The thesis of this paper is that where you find administrative detentions,<sup>2</sup> you are likely to find torture. We will show that this connection ex-

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<sup>††</sup> Douglas Valentine is the author of numerous articles and four books: DOUGLAS VALENTINE, *THE HOTEL TACLOBAN* (1984), DOUGLAS VALENTINE, *THE PHOENIX PROGRAM* (1990), DOUGLAS VALENTINE, *TDY* (2000) and DOUGLAS VALENTINE, *THE STRENGTH OF THE WOLF* (2004). His fifth book, a history of federal drug law enforcement, will be published next year by University Press of Kansas. He dedicates this article to Alice.

<sup>1</sup> Throughout this article, the authors use documents that were obtained by Douglas Valentine ("DV") through Freedom of Information Act requests during the writing of his book, DOUGLAS VALENTINE, *THE PHOENIX PROGRAM* (reprint 2000) (1990) [hereinafter VALENTINE]. These documents are in DV's personal collection, identified by subject and date [hereinafter DV Collection]. Documents in the DV collection are here cited by the title of the document, to the extent it can be ascertained, or by other identifying features of the document(s). See generally TheMemoryHole.org, Documents from the Phoenix Program: Supplied and Introduced by Douglas Valentine, <http://www.thememoryhole.org/phoenix/>.

<sup>2</sup> In this article, the terms administrative detentions, indefinite detentions, detention scheme, or simply detentions, mean "detention by the Executive Branch without traditional due process and/or human rights protections." A large portion of the discussion in this paper focuses on illustrations of improper or inadequate process or lack of procedural protections. We understand that detentions of POW's are lawful during the duration of an armed conflict. The detainees held in the War on Terror, however, have not been determined to be POW's. Where a detainee in an armed conflict is not determined to be a POW, he may not be detained indefinitely without charges. See Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 514 (2003) [hereinafter Paust, *Judicial Power*] ("If any person detained during an armed conflict is not a POW, such person nevertheless benefits from protections under common Article 3 of the Geneva Conventions, which applies today in all armed conflicts and which incorporates customary human rights to due process into the conventions.").

ists even where it is clear that investigations and screenings leading to such detentions are, as Alberto Gonzales put it, "not haphazard, but elaborate, and careful . . . reasoned and deliberate."<sup>3</sup>

This reason is simple and can be traced to the elements of administrative detention itself: the absence of human rights safeguards and normal legal guarantees such as due process, *habeas corpus*, fair trial, confidential legal counsel, and judicial review; vague and confusing definitions, standards, and procedures; inadequate adversarial procedural oversight; excessive Executive Branch power stemming from prolonged emergencies; and the involvement of the Central Intelligence Agency ("CIA") or other secret, thus unaccountable, Executive Branch agencies.

Without such protections, justice does not work and human rights are jeopardized. As William F. Schultz, Executive Director of Amnesty International, put it:

This year we are witnessing not just a series of brutal but fundamentally independent human rights violations committed by disparate governments around the globe. This year we are witnessing something far more fundamental and far more dangerous. This year we are witnessing the orchestrated destruction by the United States of the very basis, the fragile scaffolding, upon which international human rights have been built, painstakingly, bit by bit by bit, since the end of World War II.<sup>4</sup>

The system has been intentionally broken by the Bush Administration, just as it was by the Johnson and Nixon Administrations during the Vietnam War.

### *A. Buried Truths about Detentions and Torture*

Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act") provides for the "mandatory detention of suspected terrorists."<sup>5</sup> This section nowhere refers to the detentions as "administrative detentions," which result from administrative (that is, Executive Branch), not judicial, determinations. Yet this is exactly what they are, and they have been used before. The U.S. Government's internment of Japanese immi-

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<sup>3</sup> Alberto R. Gonzales, Counsel to the President, Remarks Before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), *available at* [http://www.abanet.org/natsecurity/judge\\_gonzales.pdf](http://www.abanet.org/natsecurity/judge_gonzales.pdf) [hereinafter Gonzales Remarks].

<sup>4</sup> William F. Schultz, Executive Dir., Amnesty Int'l, Remarks at the Welcoming Plenary of the Annual General Meeting of Amnesty International (Apr. 4, 2003), <http://www.amnestyusa.org/events/agm/agm2003/williamshulz.html>.

<sup>5</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-53 (2001) (codified at 8 U.S.C.S. § 1226a (2005)).

grants during the Second World War is perhaps the most recognizable example.

Section 412(a) authorizes the Attorney General to take into custody any alien whom he certifies as a terrorist.<sup>6</sup> The alien may be detained indefinitely, in renewable periods of six months, as long as the Attorney General determines that he is a threat to national security, or endangers some individual or the general public.<sup>7</sup>

Administrative detentions—sometimes called preventive detentions—are, by definition and practice, sought only during “national emergencies.” The emergency is the rationale for depriving suspected terrorists of adequate due process or human rights safeguards. A declaration of a national emergency is generally made unilaterally by the President and, once declared, the administrative detention laws may stay on the books for decades. This is one of the primary reasons why they are so dangerous, for without any Congressional determination of the beginning or end of hostilities, these inherently anti-democratic laws may be used for purposes of political repression.<sup>8</sup>

In promulgating the PATRIOT Act administrative detention provision, Congress unlearned the lessons of our founders. They subverted treasured safeguards found in the Declaration of Independence, the U.S. Constitution, and its core Bill of Rights.

In enacting Section 412, Congress forgot its own teaching from only thirty years earlier when, in 1971, it repealed the Emergency Detention Act of 1950 (a law enacted in reaction to the hysteria of the Communist scare of the infamous McCarthy era)<sup>9</sup> and enacted the Non-Detention Act, prohibiting the detention of United States citizens “except pursuant to an Act of Congress.”<sup>10</sup> The Emergency Detention Act (“EDA”) was modeled on the detention laws used to incarcerate people of Japanese descent during World War II and passed by Congress over President Truman’s veto. The EDA provided for administrative detentions of persons whom the Attorney

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<sup>6</sup> *Id.* § 412(a)(1) (codified at 8 U.S.C.S. § 1226a(a)(1) (2005)).

<sup>7</sup> See *id.* § 412(a)(7) (codified at 8 U.S.C.S. § 1226a(a)(7) (2005)).

<sup>8</sup> There was no declaration of national emergency preceding the enactment of the PATRIOT Act, however.

<sup>9</sup> Act to amend title 18, United States Code, to Prohibit the Establishment of Detention Camps, and for Other Purposes, Pub. L. No. 92-128, 85 Stat. 347 (codified at 18 U.S.C. § 4001(a) (2000)).

<sup>10</sup> *Id.* See also Masumi Izumi, *Prohibiting “American Concentration Camps”: Repeal of the Emergency Detention Act and the Public Historical Memory of the Japanese American Internment*, 74 PAC. HIST. REV. 165, 190-91, 191 n.68 (2005), available at <http://caliber.ucpr.net/doi/pdf/10.1525/phr.2005.74.2.165>.

General believed might commit espionage or sabotage, if the President declared the existence of an "internal security emergency."<sup>11</sup>

The EDA was never invoked<sup>12</sup> and ultimately was repealed because it came widely to be viewed as dangerous to civil liberties.<sup>13</sup> Truman, in unsuccessfully attempting to veto it, had noted that it "would make a mockery of our Bill of Rights [and] would actually weaken our internal security measures."<sup>14</sup>

Today's Congress seems to have forgotten the lessons of history and since September 11th many Americans have blindly accepted the Bush Administration's assertion of authority to indefinitely detain persons without a trial. We believe the government is only detaining terrorist suspects to keep them from doing us harm. Having put our faith in the government in a time of a perceived emergency, we believe the Administration's intention is to protect their freedoms, not to create a system for creating and abusing detainees.

Yet, legal scholars have raised concerns about the PATRIOT Act's detention provisions, as well as the detention provisions of the Military Commissions promulgated under President Bush's Military Order of November 13, 2001, which allow the Secretary of Defense to detain designated alien terrorist suspects without the restrictions that Section 412 contains.<sup>15</sup>

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<sup>11</sup> Emergency Detention Act of 1950, 50 U.S.C. §§ 811-26 (1970) (repealed 1971); Internal Security (McCarran) Act of 1950, 50 U.S.C. § 781 (1988) (repealed 1993) (including the EDA as title II and also referred to as "the anticommunist law").

<sup>12</sup> See Izumi, *supra* note 10, at 186 ("Although the [EDA] has not been invoked since its enactment, its mere presence on the books is an offense especially to Americans of color." (quoting *Hearings Relating to Various Bills to Repeal the Emergency Detention Act of 1950: Hearings Before the H. Comm. on Internal Sec.*, 91st Cong. 3034 (1970) (statement of Rep. Shirley Chisholm))).

<sup>13</sup> See Brief of Fred Korematsu et al. as Amici Curiae Supporting Respondents, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), available at [http://pegc.no-ip.info/archive/Supreme\\_Court/](http://pegc.no-ip.info/archive/Supreme_Court/Padilla_merits/Padilla_am_Korematsu.pdf)

*Padilla\_merits/Padilla\_am\_Korematsu.pdf* ("[M]embers of Congress expressed concern regarding whether the [EDA] violated constitutional guarantees by permitting 'detentions not on the basis of an actual act committed in violation of law, but on the basis of mere suspicion.'" (quoting 117 CONG. REC. 31535 (1971) (statement of Rep. Evins)). See also Izumi, *supra* note 10, at 166 ("[T]he mere continued existence of these legal provisions has aroused concern among many Americans that the act might someday be used to apprehend and detain citizens who hold unpopular views." (quoting President Richard M. Nixon: Statement on Signing Bill Repealing the Emergency Detention Act of 1950, PUB. PAPERS 985, 986 (Sept. 25, 1971))).

<sup>14</sup> MICHAEL BARSON, *BETTER DEAD THAN RED!: A NOSTALGIC LOOK AT THE GOLDEN YEARS OF RUSSIAPHOBIA, RED-BAITING, AND OTHER COMMIE MADNESS* (1992).

<sup>15</sup> See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001). See generally U.S. Dep't of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions for Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. 9.1-9.12

Additionally, the detentions of U.S. citizens Yaser Esam Hamdi, Jose Padilla, and Ali Saleh Kahlal al-Marri<sup>16</sup> have raised concerns. President Bush, citing his power as Commander-in-Chief and the laws of war, has unilaterally declared these individuals “unlawful enemy combatants” subject to indefinite detention without trial or access to an attorney and without providing for a status determination hearing by a competent tribunal, required by the Geneva Conventions.<sup>17</sup> The central concern raised by qualified legal observers about these detentions generally involves issues of due process and other constitutional and/or human rights guarantees.<sup>18</sup>

However, few legal scholars or government officials have discussed the historically established connection between administrative detentions and torture. The subject only came into public consciousness with the revelation that U.S. soldiers were torturing terrorist suspects at Abu Ghraib Prison in Iraq, Bagram Airbase in Afghanistan, and the detention facilities at the U.S. Naval Base in Guantanamo, Cuba. Since then, American and foreign journalists and human rights activists began to raise suspicions, subsequently borne out, that U.S. soldiers and CIA officers were routinely torturing terrorist suspects at numerous detention centers around the world.<sup>19</sup>

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(2004) (including “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism” as § 9); Charles Doyle, *Senior Specialist, Cong. Research Serv., Terrorism: Section by Section Analysis of the USA PATRIOT Act*, CRS Report for Congress (Dec. 10, 2001), available at <http://fpc.state.gov/documents/organization/7952.pdf> (noting “Uncertain is the relationship between section 412 and the President’s Military Order of November 13, 2001, which allows [detention] . . . without express limitation or condition except with regard to food, water, [etc.]”).

<sup>16</sup> See *infra* notes 30-33 and accompanying text.

<sup>17</sup> See *infra* note 276. After the Supreme Court ruled in the *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) cases that enemy combatants have some due process rights, the Administration provided for status determination hearings. See *infra* notes 140-42 and accompanying text.

<sup>18</sup> See NEAL R. SONNETT ET AL., ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, PRELIMINARY REPORT (2002), available at [http://www.abanet.org/leadership/enemy\\_combatants.pdf](http://www.abanet.org/leadership/enemy_combatants.pdf) [hereinafter ABA TASK FORCE REPORT]. See also *id.* at 22 (“Congress should . . . maintain continuing oversight of detention of U.S. citizens to assure that such detentions are consistent with Due Process, American tradition, and international law.”) See generally *id.* at 20-25 (explaining ABA’s recommendations). But see Gonzales Remarks, *supra* note 3 (“But nothing in the law of war has ever required a country to charge enemy combatants with crimes, provide them access to counsel, or allow them to challenge their detention in court.”).

<sup>19</sup> See Will Dunham, *US Invites UN Torture Investigator to Guantanamo*, EPOCH TIMES, Oct. 29, 2005, available at <http://english.epochtimes.com/news/5-10-29/33887.html>. See also Press Release, Am. Civil Liberties Union, U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq (Oct. 24, 2005), available at <http://www.aclu.org/intlhu/manrights/gen/21236prs20051024.html> [hereinafter ACLU, U.S. Killed Detainees]. See also Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

Nonetheless, the close historical connection between administrative detentions and torture has largely remained unrecognized.

In this paper, we show that the conjoining of administrative detentions and torture is sadly by no means new to U.S. Government policies and practices. Specifically, we show that during the Vietnam War, the United States engaged in a massive program of indefinite administrative detentions in South Vietnam of persons considered "dangerous to the national security" that engendered widespread torture and deaths of terrorist suspects.

There are many similarities between the Vietnam detentions and those used in the War on Terror, and those similarities are found not only within the procedures themselves but in the rationales for and policies behind them—and even in the conditions of fear that created them.

We do not attempt to show here that administrative detentions alone compel the use of torture. Our view is that where administrative detentions are used—where, during a perceived national emergency or threat, people are detained without due process—torture is only a small step away.<sup>20</sup>

Furthermore, the Vietnam detention procedures provide a clear and compelling flow chart of the web of connections between administrative detentions, intelligence laws, national security courts (i.e. courts intended to deal exclusively with national security concerns), violations of international law (particularly the Geneva Conventions), and torture. We will show that these components now also appear in U.S. law and policies in the War on Terror.

Behind this web is a disturbing logic rooted in the dark side of the human psyche. The purpose of detention is to keep the individual secured, obtain a confession or intelligence on other suspected terrorists, and sometimes to turn a suspect into a double agent.<sup>21</sup> Torture in varying degrees has historically been used to achieve such results.<sup>22</sup> Intelligence laws (spying on

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<sup>20</sup> Due process is a right recognized in international law to all persons. See *infra* Appendix A for a note on the general principles of international human rights we adopt here. We also adopt the Resolution passed by the American Society of International Law at its centennial annual meeting in Washington, DC, on March 30, 2006. American Society of International Law, Resolution Adopted, <http://www.asil.org/events/am06/resolutions.html>. See *infra* Appendix C for text. See also the earlier draft ASIL resolution and list of signatures (presented by Ben Davis) and a competing draft. The Kirgis Draft, <http://law.utoledo.edu/faculty/BDavis/BDavis.htm>.

<sup>21</sup> Cf. Gonzales Remarks, *supra* note 3, at 4 ("The detention of enemy combatants serves two vital objectives in the global war on terror: preventing killers from rejoining the enemy and continuing to fight, and enabling the collection of intelligence about the enemy.").

<sup>22</sup> See Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, available at <http://www.theatlantic.com/doc/200310/bowden> ("Governments around the world continue to employ rape and mutilation, and to harm family members, including children, in order to extort confessions or information from those in captivity."). See also Amanda Ripley, *The Rules of Interrogation: It's a Murky Business, But Some Methods Work Better Than Others*, TIME, May 17, 2004, at 45, available at <http://www.time.com/>

suspects without probable cause of criminal activity) and “national security courts”<sup>23</sup> or military tribunals (conducted without adequate due process and other constitutional protections) support the purpose of administrative detentions, as does ignoring the Geneva Conventions. We will thus spend some time discussing each of these issues.

Just as it prevents publishing photographs of body bags of dead U.S. soldiers, the Bush Administration uses censorship, disinformation and propaganda to carefully conceal the brutal logic of its unstated policies from the public. But as news reports increasingly show, the connection between administrative detentions and torture is far from tenuous, or, more importantly, far from unintentional. And any administration that engages in the intentional creation of such a web—a criminal conspiracy—should be held responsible for the predictable result.<sup>24</sup>

Because we feel that the convergence between the practices of these two periods (Vietnam and today) is most clearly illustrated by a review of the laws and procedures, we have not attempted here to survey details of

time/archive/preview/0,10987,994180,00.html (“If such interrogation tactics are legally questionable, are they at least useful? . . . The answer is yes—sometimes—but not without great risk.”); Hina Jilani, *Antiterrorism Strategies and Protecting Human Rights*, AMNESTY NOW, Summer 2002, at 1 (explaining that arbitrary detention and the “use of torture to extract confessions or information has increased.”).

<sup>23</sup> The concept of “national security courts” was recently proposed by a former federal prosecutor. Andrew C. McCarthy, *Abu Ghraib & Enemy Combatants: An Opportunity to Draw Good Out of Evil*, NAT’L REV. ONLINE, May 11, 2004, <http://www.nationalreview.com/mccarthy/mccarthy200405110832.asp>. For a critique of this concept, see Jennifer Van Bergen, *If They Lie in Public, What Would They Do in Secret?: National Security Courts and Torture Warrants*, COUNTERPUNCH (Counterpunch, Petrolia, Cal.), Aug. 20, 2004, available at <http://www.counterpunch.org/bergen08202004.html>. See also discussion *infra* Part IV.B.

<sup>24</sup> Others are now calling for high level accountability. See Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 862-63 (2005) [hereinafter Paust, *Executive Plans*] (“I know of no other instance in the long history of the United States of a plan approved by lawyers and at the highest levels of our government systematically to deny human beings protections under the laws of war. . . . I know of no other authorization of a President to deny treatment required under the Geneva Conventions. I know of no other instance in our history when a Secretary of Defense, top U.S. Generals, or a DOD Working Group approved such denials.”); ACLU, *U.S. Killed Detainees*, *supra* note 19 (quoting Anthony D. Romero, Executive Director, Am. Civil Liberties Union: “High-ranking officials who knew about the torture and sat on their hands and those who created and endorsed these policies must be held accountable.”); Joanne Laurier, *PBS Film Documents Rumsfeld’s Role in Authorizing Torture*, WORLD SOCIALIST WEB SITE, Oct. 26, 2005, <http://www.wsws.org/articles/2005/oct2005/pbs-o26.shtml> [hereinafter Laurier, *Rumsfeld’s Role*] (quoting Mark Danner, author of MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB AND THE WAR ON TERROR* (2004): “What probably is very new, and new with the war on terror, is that there exists now documentary evidence, including documents from the Department of Justice lawyers themselves, talking about these procedures and, in effect, approving them.”).



reports of torture or to search for smoking-gun proof of official intent to engage in torture. For our purposes, it is sufficient that abuse and torture have historically occurred where administrative detentions were resorted to. One would have thought that, if not Vietnam, World War II would have taught us this lesson. One would have thought that a nation which was in large part responsible for the rescue of tens of thousands of Concentration Camp survivors and was a judicial participant in one of the most significant war crimes tribunals in history, the Nuremberg trials, would know better. How American officials could justify the detention camps in Vietnam, knowing about the torture and murders of innocents in them, after having witnessed Hitler's internment camps and learned of the horrors he perpetrated in them, is an unanswered question. But, after the revelations of Vietnam—which all came out in congressional hearings in 1971<sup>25</sup> that led to both the repeal of the EDA and ultimately by degrees to “reforms” of the CIA's Phoenix Program, contributing to the end of that protracted War—Section 412 and Bush's Military Commissions and unlawful enemy combatant designations are inexcusable.

There are certainly many more comparisons that could be made to the present detention situation but they are beyond the scope of this article.<sup>26</sup> Here we wish merely to raise similarities between current administra-

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<sup>25</sup> *U.S. Assistance Programs in Vietnam: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92nd Cong. 176 (1971) (statement of William E. Colby, U.S. Ambassador to Vietnam and Deputy to the Commander for Civil Operations and Rural Development Support, Vietnam), available at <http://homepage.ntlworld.com/jksonc/docs/phoenix-hcgo-19710719.html> [hereinafter Colby Statement]; *The Geneva Conventions and the Phoenix Program*; in *U.S. Assistance Programs in Vietnam: Hearings Before Foreign Operations and Government Information S. Comm. of the H. Comm. on Gov't Operations*, 92nd Cong., 1st Sess. 217-18 (1971) (attached to statement by William Colby, U.S. Ambassador to Vietnam and Deputy to the Commander for Civil Operations and Rural Development, Vietnam), available at <http://homepage.ntlworld.com/jksonc/docs/phoenix-hcgo-19710719.html> [hereinafter *Geneva Memo*].

<sup>26</sup> For example, comparisons could be made to present-day detention camps in Israel, the Gulag in the Soviet Union during the Cold War, Concentration Camps in Germany during World War II, extrajudicial detentions in South America during American involvement in those countries, among others. For U.S. involvement in foreign detentions and torture, see generally Christopher Hitchens, *The Case Against Henry Kissinger*, HARPER'S MAG., Feb. & Mar., 2001, available at [http://www.thirdworldtraveler.com/Kissinger/CaseAgainst1\\_Hitchens.html](http://www.thirdworldtraveler.com/Kissinger/CaseAgainst1_Hitchens.html) and [http://www.thirdworldtraveler.com/Kissinger/CaseAgainst2\\_Hitchens.html](http://www.thirdworldtraveler.com/Kissinger/CaseAgainst2_Hitchens.html). See also E-mail from Jennifer Van Bergen to Bernard V. Kleinman, Attorney (Mar. 5, 1999, 14:09:43 EST) [hereinafter JVB, *Toscanino Cases*], available at <http://jvbline.org/tosc-anino.pdf> (making comments entitled “My Comments on the “Toscanino Cases”—Defendants’ Failure to Prove Allegations” and discussing situations in which courts may decline adjudication where U.S. involvement in detention and torture by foreign power shocks the conscience); E-mail from Jennifer Van Bergen to Bernard V. Kleinman, Attorney (Mar. 3, 1999, 14:38:05 EST) [hereinafter JVB, *US Nonresponsibility*], available at <http://jvbline.org/exceptions.pdf> (making comments entitled “The Exceptions to the Doctrine of US Nonresponsi-

tive detention policies and those used in Vietnam. We believe that our conclusions reveal crucial buried truths about administrative detentions that deserve to be fully vetted and considered in the light of day in order to prevent the same horrors that occurred in Vietnam. We hope that this paper will point the way for Congress to reconsider the legality and advisability of permitting administrative detention in any guise.

## II. THE WAR ON TERROR DETENTION CENTERS

Before beginning our comparison of detention programs used in the Vietnam War with those used in the War on Terror, we would like to note a few similarities and differences between these conflicts and pinpoint the different types of detention centers now in use.

The Vietnam War was similar to the "War on Terror" in several respects. In both cases, our enemy was/is vastly outgunned and could not/cannot win main force military battles. The enemy resorts to guerilla warfare tactics and attempts to win victories primarily on the political and psychological fronts. But unlike the Vietnam War, which was fought entirely within one foreign country, the War on Terror is spread around the globe. Therefore, our focus is on the locations of American detention centers in the present war. We identify four primary known detention locations: Guantanamo, Iraq, Afghanistan, and the United States. We consider only Guantanamo, Iraq, and the U.S. in this paper.<sup>27</sup>

Each of these situations involves different circumstances and combatants. The three detained U.S. citizens are in military brigs in the U.S.<sup>28</sup> Jose Padilla was being held on a material witness warrant when Bush decided to designate him an "unlawful enemy combatant" and detain him in-

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bility for Foreign Police Acts" and detailing four situations under which U.S. courts hold U.S. officials responsible for torture during detentions by foreign powers).

<sup>27</sup> With respect to Iraq, we focus primarily on the period leading up to the revelations of torture and abuse at Abu Ghraib prison in Baghdad. We also do not discuss the CIA "Black Sites." See Priest, *supra* note 19 ("Virtually nothing is known about who is kept in the facilities, what interrogation methods are employed with them, or how decisions are made about whether they should be detained or for how long."). Priest also discusses concerns about torture at these sites. *Id.* See also Friends Comm. of Nat'l Legislation, *Torture Will be Conquered by the Rule of Law*, FRIENDS COMMITTEE OF NAT'L LEGIS., Aug. 24, 2005, [http://www.fcnl.org/civil\\_liberties/torture.htm](http://www.fcnl.org/civil_liberties/torture.htm) [hereinafter FCNL, *Torture*].

<sup>28</sup> Human Rights First, "Enemy Combatants" in the United States, [http://www.humanrightsfirst.org/us\\_law/detainees/enemycombatants.htm](http://www.humanrightsfirst.org/us_law/detainees/enemycombatants.htm). Padilla was recently released from military custody and transferred to the custody of civil authorities to be tried on criminal charges. See Jay Weaver, *Padilla Swoops into Miami Court*, MIAMI HERALD, Jan. 6, 2006, available at <http://www.miami.com/mld/miamiherald/news/13562373.htm>.

definitely.<sup>29</sup> Ali Saleh Kahlah al-Marri was indicted on charges of credit card fraud and lying to the FBI, but was subsequently declared an unlawful enemy combatant by Bush.<sup>30</sup> Yasser Hamdi was captured in Afghanistan and when it was learned he was a U.S. citizen, was transferred to a military brig in the U.S. and held as an unlawful enemy combatant.<sup>31</sup> No part of the screening procedures used in these designations, as we shall see, accorded minimal human rights guarantees under the U.S. Constitution or international law, including the laws of war. No substantive information has been released relating to the treatment of these prisoners, although we know that all have been held in isolation and interrogated extensively.

The Guantanamo detainees were captured in Afghanistan at the outset of U.S. military operations there in direct response to September 11th. These persons were presumably captured on the battlefield<sup>32</sup> (although some have claimed they were not engaged in combat), "screened" by an unknown process by combat units (undoubtedly supervised by the CIA), and shipped to Guantanamo. Initial detaining and screening units evidently determined these individuals to be loyal to Al Qaeda or the Taliban. All were declared enemy combatants by President Bush.<sup>33</sup> None were given combatant status review hearings until two years after their capture and several months following the Supreme Court rulings that required them. Of the approximately 550 detainees remaining at Guantanamo, only fifteen have

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<sup>29</sup> See Jennifer Elsea, *Detention of American Citizens as Enemy Combatants*, CRS REP. FOR CONGRESS, at CRS-6 (Feb. 24, 2005), available at <http://www.fas.org/sgp/crs/misc/RL31724.pdf> [hereinafter Elsea, *Detention of American Citizens*].

<sup>30</sup> CollegeFreedom.com, *The Ali Saleh Kahlah al-Marri Case*, <http://collegefreedom.org/marri.htm>; Press Release, U.S. Attorney's Office for the Cent. Dist. of Ill., *West Peoria Man Charged in Central Illinois with Making False Statements in Investigation of September 11th Terror Attacks* (May 22, 2003), available at <http://www.usdoj.gov/usao/ilc/press/2003/may/052203almarri.html>; Human Rights First, *In the Courts: Ali Saleh Kahlah al-Marri, Qatari Student*, [http://www.humanrightsfirst.org/us\\_law/inthecourts/supreme\\_court\\_al\\_marri.htm](http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_al_marri.htm).

<sup>31</sup> See Elsea, *Detention of American Citizens*, *supra* note 29, at CRS-3-4; *U.S. Citizens with Alleged Links to Al Qaeda*, HUMAN RIGHTS FIRST, at 4, available at [http://www.humanrightsfirst.org/us\\_law/after\\_911/PDF/U.S.%20Citizens%20with%20Alleged%20Links%20to%20Al%20Qaeda.pdf](http://www.humanrightsfirst.org/us_law/after_911/PDF/U.S.%20Citizens%20with%20Alleged%20Links%20to%20Al%20Qaeda.pdf).

<sup>32</sup> It is not entirely clear where "the battlefield" is in the War on Terror. It appears that immediately following September 11th, the entire country of Afghanistan was considered the battlefield. Similarly, in the present war in Iraq, it appears the entire country is viewed as the battlefield. In terms of protection under the Geneva Conventions, location of the battlefield does matter, as combatants captured on the battlefield or in the combat arena are generally considered Prisoners Of War. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>33</sup> See Jennifer Elsea, *Detainees at Guantanamo Bay*, CRS REP. FOR CONGRESS, at CRS-2 (July 20, 2005), available at <http://www.fas.org/sgp/crs/natsec/RS22173.pdf> [hereinafter Elsea, *Guantanamo Detainees*].

been deemed eligible for trial by military tribunals.<sup>34</sup> While we discuss the screening and tribunal procedures below, the exact criteria used to select these fifteen is unknown. Those who are not scheduled for military tribunal hearings remain in indefinite detention. Torture has been documented at Guantanamo.<sup>35</sup>

The third category of detainees discussed herein are those taken in the Iraq invasion. These persons are not associated with the September 11th attacks. They are fugitives from Saddam Hussein's regime, or "insurgents" fighting American occupation. They may or may not be opposed to the United States, other than as an occupying force, and they may not have been previously engaged in a jihad. The photographs of abusive treatments of prisoners at Abu Ghraib in Baghdad graphically revealed torture.

There are other detention centers, known and unknown, in the War on Terror.<sup>36</sup> However, we focus here on Guantanamo, Iraq, and the U.S. .

### III. THE PHOENIX PROGRAM AND THE WAR ON TERROR

#### A. "Laws" and Themes

In June 1967, the CIA launched a screening, detention, and interrogation program in Vietnam that was a major building block of what eventually became known as "the Phoenix Program."<sup>37</sup> By the end of the Vietnam War, Phoenix had become notorious for its paramilitary death squads, which claimed between 20,000 (according to the CIA) and 40,000 (according to the South Vietnamese) lives.<sup>38</sup>

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<sup>34</sup> See Jennifer Elsea, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rule and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, CRS REP. FOR CONGRESS, at CRS-1 (Jan. 18, 2005), available at <http://www.fas.org/irp/crs/RL31600.pdf> [hereafter Elsea, *DOD Rules for MCs*]; Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, CRS REP. FOR CONGRESS, at CRS-3 (Jan. 13, 2005), available at [www.fas.org/irp/crs/RL31367.pdf](http://www.fas.org/irp/crs/RL31367.pdf) [hereafter Elsea, *Battlefield Detainees*].

<sup>35</sup> Dunham, *supra* note 19 ("Men who have been released from Guantanamo have stated they were tortured there. The [ICRC] last year accused the U.S. military of using tactics 'tantamount to torture' on Guantanamo prisoners. An FBI agent wrote in a memo that became public last year that Pentagon interrogators used 'torture techniques' at Guantanamo.").

<sup>36</sup> FCNL, *Torture*, *supra* note 27 (noting that "detention facilities stretching from South Asia to Iraq to Guantanamo, those known to the world and those which are shrouded in complete secrecy, are lawless enclaves"); Priest, *supra* note 19 (reporting detention centers called "black sites" operated by CIA "in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe").

<sup>37</sup> VALENTINE, *supra* note 1, at 13.

<sup>38</sup> *Id.* at 378 (noting 26,843); Colby Statement, *supra* note 25, at 191, 236 (noting 20,587); RALPH MCGEHEE, *CIA AND OPERATION PHOENIX IN VIETNAM 66-73* (1996) (noting United States 20,857 and Vietnam 40,994).

Seldom, however, has Phoenix been recognized for the huge detention and interrogation facet that enabled the CIA to compile computerized blacklists of suspected terrorists. As in Iraq (and the unknown "black sites" where so-called "ghost detainees" are held),<sup>39</sup> where the U.S. does not keep track of civilian deaths, it is not known how many innocent people were caught in the Phoenix dragnet. It is only known that Phoenix led to the torture and murder of many, possibly thousands of innocent Vietnamese people.

The basis for the screening, interrogation, and detention aspect of Phoenix was established in 1956, when the fledgling Government of Vietnam issued Ordinance 6, which provided for the administrative detention of "security offenders."<sup>40</sup> Ordinance 6 was succeeded by several Decree-Laws and Ministerial orders, the most significant being the 1965 "Emergency Decree Law 3/65."<sup>41</sup> This law provided for "administrative detention of persons considered dangerous to the national security, without court hearing."<sup>42</sup> The detention orders were referred to as "An Tri."

Today, the War on Terror has engendered three American detention "laws"<sup>43</sup> to deal with the new enemy of the twenty-first century. These resemble An Tri detentions in numerous and various ways as discussed in the next section and the remainder of this paper. These "laws" are: Section 412 of the PATRIOT Act, which provides for mandatory indefinite detention of aliens considered dangerous to national security,<sup>44</sup> the presidential Military Order of November 13, 2001 (and the accompanying Military Commissions procedures),<sup>45</sup> and the presidential designations of so-called "unlawful enemy combatants."<sup>46</sup>

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<sup>39</sup> See Priest, *supra* note 19; FCNL, *Torture*, *supra* note 27.

<sup>40</sup> ROBERT G. HARPER, HANDBOOK ON GVN NATIONAL SECURITY LAWS AND PROCEDURES: HANDLING OF CIVILIAN SECURITY SUSPECTS 16-17 (1971) in Memorandum from Robert Starr to William Colby, Ambassador (July 16, 1971) (on file with author in DV Collection, An Tri folder, 1971) [hereinafter HARPER, HANDBOOK].

<sup>41</sup> *Criminal Justice and the Court System in the Republic of Vietnam*, in LOUISIANA STATE UNIVERSITY SCHOOL OF LAW, THE ADMINISTRATION OF JUSTICE IN THE REPUBLIC OF VIETNAM 43 (1971) [hereinafter *Justice in Vietnam*].

<sup>42</sup> *Id.*

<sup>43</sup> Only one of these "laws" is actually a statute: the USA PATRIOT Act. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49 and 50 of the United States Code).

<sup>44</sup> *Id.* § 412 (codified at 8 U.S.C.S. § 1226a (2005)).

<sup>45</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).

<sup>46</sup> See Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-2. For a general discussion of "unlawful belligerents" see *id.* at CRS-19. See also Elsea, *Detention of American Citizens*, *supra* note 29, at CRS-1-2.

Through his Military Order, Bush granted himself extraordinary powers to identify al Qaeda members and those who harbor them, and to detain these people without review by the judicial or legislative branches of government.<sup>47</sup> The subsequent Department of Defense Military Commissions Order No. 1 (“MCO”) was the “enabling law” that put the Military Order into effect.<sup>48</sup> Finally, there came Bush’s “unlawful enemy combatant” (“UEC”) designations of United States citizens,<sup>49</sup> designations not based on his Military Order but potentially triable under the MCO.

In addition to the lack of due process, the main theme of these laws is overarching executive power. In none of them are the incarcerations judicially imposed or based on proof of criminal activity that would be admissible in a court of law. In each, an official of the Executive Branch has near-complete unilateral authority to determine who is detained and for how long. Those held under Section 412 are subject to periodic review by the Attorney General and his determinations are appealable only to the United States Court of Appeals for the District of Columbia.<sup>50</sup> Those subject to the Military Order may not appeal to any court of law, including international courts.<sup>51</sup> The Administration claimed that those held under Bush’s unlawful enemy combatant designations had neither due process nor habeas corpus rights.<sup>52</sup>

More than anything else, it is this theme of near-absolute, unreviewable executive authority that has the potential to bring Phoenix home to roost.

It is worth noting here that administrative detentions, in addition to being a means of obtaining intelligence about and a method of containment of an unpredictable and dangerous enemy, are also a method of power retention by the detaining power. Furthermore, while every U.S. administration that has enacted administrative detention laws or otherwise resorted to internments has claimed it does so for extraordinary reasons, neither the methods of these detentions nor the types of persons detained are substantially different from one administration to the next. There is always enough of an emergency to justify administrative detentions. Again, administrative

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<sup>47</sup> 3 C.F.R. 918.

<sup>48</sup> U.S. Dep’t of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions for Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. 9.1-9.12 (2004).

<sup>49</sup> See *supra* note 49.

<sup>50</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-53 (2001) (codified at 8 U.S.C.S. § 1226a (2005)).

<sup>51</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).

<sup>52</sup> See *supra* note 49; Elsea, *Guantanamo Detainees*, *supra* note 33, at CRS-1.

detentions apply, by definition, in national emergency situations to those considered dangerous to the national security.<sup>53</sup>

<sup>53</sup> See, e.g. Alien Act, ch. 66, 1 Stat. 577 (1798) (providing for detention and removal of "alien enemies" during declared hostilities or threatened hostilities); Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (providing for exclusion, and ultimately detention, of Japanese persons from West Coast areas to protect against espionage and sabotage to national defense materials, premises, and utilities); Emergency Detention Act of 1950, 50 U.S.C. §§ 811-26 (1970) (repealed 1971) (providing for detentions of persons whom the Attorney General believed might commit espionage or sabotage, during an invasion, war, or "internal security emergency"). Cf. Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (criminalizing opposition to and insurrection against the government and the publication of scandalous and malicious writings against the U.S.); An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States, ch. 5, 2 Stat. 451 (1807); Act . . . to punish Espionage . . . (Espionage Act), ch. 30, 40 Stat. 217 (1917) (codified as amended in 18 U.S.C. § 793) (criminalizing, *inter alia*, "communication of national defense information to persons not entitled to receive it" with up to ten years imprisonment); Act to Protect the United States Against Certain Un-American and Subversive Activities . . . (Subversive Activities Control Act), ch. 1024, 64 Stat. 987 (1950), *repealed by* Friendship Act, Pub. L. 103-199, § 803, 107 Stat. 2317, 2329 (1993); Trading with the Enemy Act, Pub. L. No. 65-91, § 16, 40 Stat. 411, 425 (1917) (providing for up to ten years imprisonment); International Emergency Economic Powers Act, Pub. L. No. 95-223, §§ 201-08, 91 Stat. 1625, 1626 (1977) (codified as amended in 50 U.S.C. §§ 1701-06). See also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 4 (2005), available at [http://www.law.harvard.edu/students/orgs/jol/vol42\\_1/chesney.php](http://www.law.harvard.edu/students/orgs/jol/vol42_1/chesney.php) ("America's terrorism-support laws have evolved out of the more general category of laws enabling the executive branch to use economic sanctions or embargoes as instruments of foreign policy and national security, a practice traceable to the earliest days of the republic."). For relevant cases see, *Ex parte Quirin*, 317 U.S. 1, 37 (1942) (describing the "German saboteurs case"—finding that citizens could be deemed "enemy belligerents"); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (Stephens, J., dictum) (deciding that a citizen may be detained as a belligerent) ("In war, all residents of the enemy country are enemies."); *Ex parte Milligan*, 71 U.S. 2, 127 (1866) (finding that U.S. citizen saboteur against the Northern states during Civil War may not be tried as a belligerent in military tribunal while civil courts function); *Id.* at 21 (The government argued: "[I]f the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates"); *Moyer v. Peabody*, 212 U.S. 78 (1909) (denying relief in damages suit against Colorado governor for detention during a miners' strike declared an insurrection); *Id.* at 84-85 ("Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power."); *Korematsu v. U.S.*, 323 U.S. 214, 218 (1944) (upholding exclusion of persons who "constituted a menace to the national defense and safety" and could "be isolated and separately dealt with"); *In re Yamashita*, *cert. denied*, 327 U.S. 1 (1946) (upholding validity of military commission to try Japanese commander after cessation of hostilities—commander was detained, tried, convicted, and executed); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (upholding the jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war; denying to German defendants the right to a writ of habeas corpus). See also *Haitian Centers Council, Inc., v. McNary*, 969 F.2d 1326, 1330 *passim* (2d Cir. 1992) (determining constitutionality of interdiction and screening program for Haitian refugees detained in Guantanamo, where due process and legal representation had been withheld from refugees); JVB, *Toscanino Cases*, *supra* note 26; JVB, *US Nonresponsibility*,

*B. How Phoenix Evolved*<sup>54</sup>

Before comparing the current laws to those under the Phoenix Program, we need to see what Phoenix was and how it came about. During the Vietnam War, the Phoenix Program coordinated the paramilitary and intelligence components of some two-dozen counterinsurgency programs in an attempt to “neutralize” the “Vietcong infrastructure” (“VCI”).<sup>55</sup> The euphemism “neutralize” meant to kill, capture, make to defect, or turn members of the “infrastructure” into double agents.<sup>56</sup> The word “infrastructure” referred to civilian members of the “shadow government” that was managing the insurgency in South Vietnam.<sup>57</sup> In other words, the Vietcong or VCI.

Members of the infrastructure were referred to as “national security offenders” no matter what their ideology; but if they were members of the Communist Party, they were also referred to as “Communist Criminals,” insofar as Communism had been outlawed and was a separate crime of status.<sup>58</sup> Screening virtually everyone in South Vietnam, and then detaining and interrogating suspects, was the systematic way the CIA sought to identify members of the VCI.<sup>59</sup>

While no extant copy of Emergency Decree 3/65 has been located, a later renewal of the law, issuing from the State Department’s Agency for International Development, “continues the emergency power of the Executive [of Vietnam] to temporarily detain people considered to constitute a danger to the National Security by publicizing or carrying out Communism

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*supra* note 26; DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE 282-314 (1996) (describing cases in different periods of American history brought “In the Name of National Security”).

<sup>54</sup> Where not otherwise referenced, this section draws heavily on VALENTINE, *supra* note 1, at 1 *passim*, and on Valentine’s notes. See generally TheMemoryHole.org, Documents from the Phoenix Program: Supplied and Introduced by Douglas Valentine, <http://www.thememoryhole.org/phoenix/>.

<sup>55</sup> See VALENTINE, *supra* note 1, at 13.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* See also *Attack Against VC Infrastructure*, THEMEMORYHOLE.ORG, Nov. 22, 1966, available at <http://www.thememoryhole.org/phoenix/attack-against.pdf> [hereinafter *Attack Against VC Infrastructure*].

<sup>58</sup> D. E. BORDENKIRCHER, TIGER CAGE: AN UNTOLD STORY 48-49 (1998). See also *infra* note 104.

<sup>59</sup> VALENTINE, *supra* note 1, at 154. See also *Attack Against VC Infrastructure*, *supra* note 57.



in any form.”<sup>60</sup> Temporarily meant two years, renewable “if the offender is considered still to constitute a danger.”<sup>61</sup>

Screening, detaining, and interrogating suspects was also how the CIA produced informants, defectors, and double agents.<sup>62</sup> Capture of VCI was the object. But VCI of “high value” (a Phoenix term recently exhumed by the CIA and used in the War on Terror and in Iraq<sup>63</sup>), were usually accompanied by bodyguards, so midnight assassinations and ambushes of high value VCI was the most common form of exploitation of the intelligence gathered through informants, defectors, double agents, and interrogations.<sup>64</sup>

Under the An Tri administrative detention emergency decree, due process was totally non-existent for suspected members of the VCI.<sup>65</sup> People whose names appeared on Phoenix blacklists were subject to midnight arrest, kidnapping, torture, indefinite detention, or assassination, simply on the word of an anonymous informer.<sup>66</sup> After capture and interrogation, if they were still alive, they were tried by “special courts” or military tribunals not unlike those proposed by Bush that were not staffed by legally trained judges.<sup>67</sup> As one official document noted: “In the Special Courts which act in terms of special laws, criminal procedures are reduced to a strict mini-

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<sup>60</sup> Emergency Detention Law art. 1 (1970) (S. Vietnam), attachment to letter of [Ambassador] William E. Colby to Prime Minister Tran Thien Khiem (Oct. 12, 1970) (on file with author in DV Collection, An Tri Folder, 1970).

<sup>61</sup> *Id.* Later suggested revisions called for six month periods, but these revisions were never put into effect. Memorandum from Ray A. Meyer, *Memorandum for Record: An Tri Observation and Recommendations* 3 (Sept. 26, 1972) [hereinafter Meyer, *Memo*] (on file with author in DV Collection, An Tri Folder, 1972). Meyer worked for “MACCORDS” or the Civil Operations and Revolutionary Development Support (CORDS) group, established in May 1967 under Military Assistance Command, Vietnam (MACV), to coordinate U.S. military and civilian operations and advisory programs in South Vietnam. MACV was a unified command under the Commander in Chief, Pacific, managing the U.S. military effort in South Vietnam. See VALENTINE, *supra* note 1, at 441, 444.

<sup>62</sup> Interviews by Douglas Valentine with Evan Parker, Nelson Brickham et al., Senior CIA Officers.

<sup>63</sup> See Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, NEW YORKER (May 24, 2004), available at [http://www.newyorker.com/fact/content/?040524fa\\_fact](http://www.newyorker.com/fact/content/?040524fa_fact); CNN.com, *Conflicting Reports Over Iraq Release* (Sept. 22, 2004), <http://www.cnn.com/2004/WORLD/meast/09/22/iraq.female.prisoners/> (last visited Apr. 14, 2006).

<sup>64</sup> VALENTINE, *supra* note 1, at 104. See also *Attack Against VC Infrastructure*, *supra* note 57.

<sup>65</sup> VALENTINE, *supra* note 1, at 13. See also HARPER, HANDBOOK, *supra* note 40.

<sup>66</sup> VALENTINE, *supra* note 1, at 13.

<sup>67</sup> HARPER, HANDBOOK, *supra* note 40.

mum.”<sup>68</sup> There was “no preliminary investigation although the offense is of a criminal nature” and no appeal.<sup>69</sup> The judges could not “pronounce extenuating circumstances, suspend action, nor punishment under the set minimum.”<sup>70</sup> As a result, “the principle of individualization of punishment cannot apply, which is in flagrant contradiction with the concept of justice and responsibility.”<sup>71</sup>

Legally unobstructed by the concepts of justice and legal responsibility, the CIA was the hidden force behind Decree 3/65 and its special courts, just as it was the hidden force behind the Phoenix Program. Likewise, the CIA is one of the hidden forces behind the reconstruction of Iraq’s Ministry of Interior, secret police forces, and judicial system, and the interrogations of detainees at various detention centers.<sup>72</sup>

To escape responsibility and ensure “plausible deniability,” the CIA in Vietnam concealed the detention aspect of Phoenix under cover of the U.S. military/civilian administration in charge of the reconstruction of South Vietnam.<sup>73</sup> The Vietnamese army and police Special Branch, along with U.S. military forces, provided the bulk of manpower and facilities used to “screen” detainees for the CIA, in the same way the CIA and military intelligence today train locals to apply Pentagon-mandated procedures to screen terrorist suspects abroad and maintain military control of prisons in Iraq and Afghanistan.<sup>74</sup>

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<sup>68</sup> *Justice in Vietnam*, *supra* note 41, at 43. Portions of this document appear to quote from the *Handbook on GVN National Security Laws*. See HARPER, HANDBOOK, *supra* note 40.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting “a Saigon lawyer”).

<sup>72</sup> See ACLU, U.S. Killed Detainees, *supra* note 19 (reporting that documents obtained by the ACLU “show that detainees died during or after interrogations by Navy Seals, Military Intelligence and “OGA” (Other Governmental Agency)—a term . . . that is commonly used to refer to the CIA.”); GEORGE R. FAY, MAJOR GEN., U.S. DEP’T OF THE ARMY, ARMY REGULATION 15-6 REP., INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 9 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> [hereinafter FAY, INVESTIGATION] (“The term Other Government Agencies (OGA) most commonly referred to the Central Intelligence Agency (CIA). The CIA conducted unilateral and joint interrogation operations at Abu Ghraib. The CIA’s detention and interrogation practices contributed to a loss of accountability and abuse at Abu Ghraib. No memorandum of understanding existed on the subject interrogation operations between the CIA and CJTF-7, and local CIA officers convinced military leaders that they should be allowed to operate outside the established local rules and procedures.”). See also Priest, *supra* note 19. Note also Vice President Cheney’s recent request to have the CIA exempted from a bill prohibiting torture. See R. Jeffrey Smith & Josh White, *Cheney Plan Exempts CIA From Bill Barring Abuse of Detainees*, WASH. POST, Oct. 25, 2005, at A1, available at [http://www.washingtonpost.com/wpdyn/content/article/2005/10/24/AR2005102402051.html?nav=rss\\_politics](http://www.washingtonpost.com/wpdyn/content/article/2005/10/24/AR2005102402051.html?nav=rss_politics).

<sup>73</sup> VALENTINE, *supra* note 1, at 116.

<sup>74</sup> *Id.* at 123.

The CIA built Phoenix operations centers in each of South Vietnam's 240 districts, in order to secretly identify and neutralize VCI.<sup>75</sup> Often, the CIA relied on the type of heavy-handed military sweeps now being conducted in Iraq.<sup>76</sup> These sweeps invariably filled makeshift detention centers (barbed wire cages with tin roofs) with innocent old men, women and children, since the actual VCI had penetrated the government's military and police security services and often knew when the sweeps were coming.<sup>77</sup> As in Iraq today, active insurgents were often better able to evade capture than innocent persons.<sup>78</sup>

By its own admission, the CIA had no effective procedure of distinguishing actual "national security violators" from innocent people<sup>79</sup>—an innocent person perhaps being, for example, a rival businessmen being blackmailed by the local Province Chief.

In all, the interrogation and detention centers there had substandard living conditions and indiscriminate crowding of POWs, common criminals, and VCI suspects.<sup>80</sup> There was no way of knowing who should be interrogated, jailed, or released.

Like the administrative detentions under the PATRIOT Act and Bush's Military Order, the Vietnamese-staffed military tribunals and security committees that heard cases could repeatedly delay someone's "trial."<sup>81</sup> An Tri hearings could be delayed for up to two years or more—usually until the proper bribe was paid.<sup>82</sup> When brought to trial, a person was unlikely to have a lawyer, which did not really matter, as there was no due process, no habeas corpus, and no need of evidence to convict.<sup>83</sup>

The CIA, as ever, was content to ignore the massive human suffering caused by its blanket civilian detention program. After all, the Vietnamese were poor, dark-skinned Buddhists, not Christians or Jews, just as the vast majority of detainees in Iraq are poor and dark-skinned, and not Chris-

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 123.

<sup>77</sup> *Id.* at 151.

<sup>78</sup> *Id.*

<sup>79</sup> Similarly, intelligence officers that have interrogated terrorist suspects in the present War on Terror have admitted that large numbers of detainees are innocent. See Laurier, *Rumsfeld's Role*, *supra* note 24 ("Another retired interrogator, Roger Brokaw, worked in Iraq for six months in 2003 and estimates that only two percent of the people he talked to were dangerous or belonged to an insurgency."); FCNL, *Torture*, *supra* note 27 ("The International Committee of the Red Cross reported that coalition intelligence officers themselves conceded that 70% - 90% of the detainees in Iraq are being held by mistake.").

<sup>80</sup> VALENTINE, *supra* note 1, at 151.

<sup>81</sup> *Id.* at 220. See also HARPER, HANDBOOK, *supra* note 40.

<sup>82</sup> VALENTINE, *supra* note 1, at 292. See also HARPER, HANDBOOK, *supra* note 40.

<sup>83</sup> VALENTINE, *supra* note 1, at 293. See also HARPER, HANDBOOK, *supra* note 40.

tians or Jews. But the CIA's abuses could not be hidden forever and eventually pressure from the Red Cross and liberal American Congresspersons forced the CIA to confront the same legal questions about detainees and "enemy combatants" (a designation that implies guilt before any is proven) that are now finally being raised in Bush's War on Terror.<sup>84</sup>

#### IV. DETENTIONS UNDER PRESENT-DAY FEDERAL LAW

##### A. U.S.A. PATRIOT Act: Codifying Administrative Detentions

The detention provision of the PATRIOT Act added a provision to the Immigration and Nationality Act (INA), mandating that the Attorney General "shall take into custody any alien who is certified" by him.<sup>85</sup> Earlier immigration law allowed for continued detention only when an alien was a danger to the community or flight risk.<sup>86</sup>

An alien may be certified if the Attorney General "has reasonable grounds to believe" that the alien has engaged in any one of a great number of listed prohibited activities.<sup>87</sup> The problem, of course, is that here, just as in the An Tri procedures, there is only limited judicial review of these certifications.<sup>88</sup>

Once an alien is certified, "the Attorney General *shall* maintain custody of such an alien until the alien is removed from the United States. . . . irrespective of any relief from removal for which the alien may be eligible."<sup>89</sup> While Section 412 requires that an alien who has not been removed or charged with a crime within seven days "shall [be] release[d],"<sup>90</sup> a person "whose removal is unlikely in the reasonably foreseeable future, may be

<sup>84</sup> VALENTINE, *supra* note 1, at 377.

<sup>85</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412(a)(1), 115 Stat. 272, 350-53 (2001) (codified at 8 U.S.C.S. § 1226a (2005)) (emphasis added) (amending the Immigration and Nationality Act § 236).

<sup>86</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003).

<sup>87</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 412(a)(3).

<sup>88</sup> An immigration or federal court may, of course, review whether individuals have met these criteria where a case comes before their courts, but the certification process itself is administrative, which usually garners judicial deference. See Anita Ramasastry, *Indefinite Detention Based Upon Suspicion: How The Patriot Act Will Disrupt Many Lawful Immigrants' Lives*, FINDLAW, Oct. 5, 2001, [http://writ.news.findlaw.com/commentary/20011005\\_ramasastry.html](http://writ.news.findlaw.com/commentary/20011005_ramasastry.html) ("According to the Act, the court may review the factual basis of the certification. But that is not particularly comforting, since the grounds for certification are broad and vague . . .").

<sup>89</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 412(a)(2).

<sup>90</sup> *Id.* at § 412(a)(5).

detained for additional periods of up to six months . . . if the release of the alien will threaten the national security of the United States or the safety of the community or any person.”<sup>91</sup> The Attorney General “shall review” the certification every six months.<sup>92</sup>

The result, of course, as with the An Tri detentions, is that “[b]y the use of repeated extensions a suspect can be detained indefinitely” without ever having any sort of genuine due process hearing.<sup>93</sup>

One in-depth legal analysis of Section 412 concludes that “[b]y denying noncitizens the opportunity for meaningful review of the certification decision, and by authorizing detention of aliens on substantively inadequate grounds, [Section 412] raises serious constitutional concerns under both the procedural and substantive prongs of the Due Process Clause.”<sup>94</sup> The author, Shirin Sinnar, notes that while Section 412 provides for habeas corpus review, “it is not clear whether a court reviewing a habeas petition could examine the factual basis for a certification decision.”<sup>95</sup> In other words, “[i]f there were enough evidence for a *prima facie* finding that reasonable grounds existed for the government’s determination, then it might not be possible for an alien to argue on habeas that he actually had no connection with terrorism or presented no threat to national security.”<sup>96</sup>

Thus, while the Justice Department claims that Section 412 requires “extensive judicial supervision” and “expressly grants aliens the right to challenge their detention in court,”<sup>97</sup> and while, as Sinnar observes, “under the statute, habeas review appears to offer the alien an opportunity for judicial review,” Sinnar adds that “in practice that protection may not amount to a meaningful hearing.”<sup>98</sup>

The Department of Justice states that “it has not proven necessary to use section 412 . . . because traditional administrative bond proceedings have been sufficient . . . .”<sup>99</sup> This raises the question: why, then, does the statute need to be on the books?

In any event, perhaps because of its disuse or because it applies only to aliens, Americans have not paid much attention to Section 412. Its

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<sup>91</sup> *Id.* at § 412(a)(6).

<sup>92</sup> *Id.* at § 412(a)(7).

<sup>93</sup> *Justice in Vietnam*, *supra* note 41, at 44.

<sup>94</sup> Shirin Sinnar, Note, *Patriotic or Unconstitutional?: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419, 1421 (2003).

<sup>95</sup> *Id.* at 1434.

<sup>96</sup> *Id.* at 1435.

<sup>97</sup> U.S. Department of Justice, *The USA Patriot Act: Myth vs. Reality*, [http://www.lifeandliberty.gov/subs/add\\_myths.htm#s412](http://www.lifeandliberty.gov/subs/add_myths.htm#s412). [hereinafter DOJ, *Myth vs. Reality*].

<sup>98</sup> Sinnar, *supra* note 94, at 1435.

<sup>99</sup> DOJ, *Myth vs. Reality*, *supra* note 97.

purpose is to keep terrorists out of the United States. Made-in-America terrorists like Timothy McVeigh remain unimpeded by this law. If a few innocent aliens get caught in the dragnet, we feel it is a price worth paying for public safety.

What we do not yet realize is that the precedents set by the PATRIOT Act administrative detentions of aliens not only *could* be expanded to include citizens, but *already have been*—by the President's unlawful enemy combatant designations, discussed below. The concern is not that a few innocent aliens may be indefinitely detained but that this could lead to the indefinite administrative detention of anyone who criticizes the government.

Moreover, the troubling codification of indefinite administrative detentions in Section 412 is made worse by the fact that the feeder provisions that define to whom and in what contexts administrative detentions apply are incredibly convoluted and confusing.<sup>100</sup>

The crimes under the national security laws of the Republic of Vietnam during U.S. occupation are ominously similar to those under the alien terrorism provisions of the PATRIOT Act. Both sets of laws were intended to address acts that threaten the public safety and/or national security<sup>101</sup> but neither provided for criminal prosecution, procedural due process, or Sixth Amendment-type protections. Both involved indefinite detentions.

Of course, the similarities between the laws are understandable when one thinks about the similarities between the two situations: the Communist insurgency in South Vietnam and the global terrorist “insurgency” against the United States. A U.S.-Vietnamese handbook on national security laws noted: “The basis for the various emergency enactments and for special punishments and procedures lies in declarations of National

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<sup>100</sup> See *infra* Appendix B (listing persons subject to 412 certification); Jennifer Van Bergen, *In the Absence of Democracy: The Designation and Material Support Provisions of the Anti-Terrorism Laws*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 107, 116-19, 144-45 (2003) (discussing interplay and circularity of terrorism definitions); Advisory Comm. to the Cong. Internet Caucus, Terrorism Legislation Comparison, [http://www.netcaucus.org/books/surveillance2001/docs/EFF\\_Leg\\_Compare\\_Chart.pdf](http://www.netcaucus.org/books/surveillance2001/docs/EFF_Leg_Compare_Chart.pdf). For example, the Attorney General may certify an alien who is a member of a foreign terrorist organization, designated such by the Secretary of State, if the alien knows or *should know* that it is a terrorist organization. Note the reliance of certification on an already existing designation, neither of which are subject to any meaningful judicial review. Further, the Attorney General may certify an alien who uses his prominence to endorse terrorist activity in a way that *undermines U.S. efforts to reduce or eliminate terrorism*. This is extremely broad.

<sup>101</sup> HARPER, HANDBOOK, *supra* note 40, at 5-10 (listing “Offenses Against National Security” including treason, sedition, espionage, sabotage, acts of insurgency, revolt, acts directed against defense or government facilities, bearing arms against, undermine morale, etc.). *Id.* at 10-14 (reporting that Civil Security Suspects could be screened and detained indefinitely). *Id.* at 6-8 (reporting that persons other than Civil Security Suspects could be detained pending trial by military or regular or field courts).

Emergency and of war.”<sup>102</sup> The An Tri procedures incorporated a clause stating: “The law is automatically ineffective at the end of the State of War or Emergency.”<sup>103</sup>

But while the PATRIOT Act was passed only six weeks after 9/11, it does not rely on a declaration of national emergency or war. Its preamble states that its purpose is: “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”<sup>104</sup> No national emergency or declaration of war is necessary to trigger the provisions. Furthermore, while certain provisions in the PATRIOT Act do sunset, the indefinite detention provision does not.<sup>105</sup>

Section 412 raises constitutional concerns similar to those raised about the Emergency Detention Act of 1950 and should be repealed as the 1950 Act was. As the statutory bridge for the extension into American law of practices long outlawed by well-established international laws and customs, Section 412 should not be kept on the books.

*B. National Security & Foreign Intelligence: Evading Constitutional and Human Rights Barriers*

National security and foreign intelligence concepts are central to the rationale for indefinite administrative detentions. It is these concepts that prompt or even compel the creation of detention programs that, by definition, must evade constitutional and human rights requirements. Administrative detentions *are* national security detentions.

Proponents of administrative detentions claim that administrative detentions are the humane alternative to dealing with national security and foreign intelligence issues—the other way being assassination.<sup>106</sup> Criminal trials are viewed as inadequate. Thus, it is important to look at the definitions of these concepts.

Provisions of the PATRIOT Act, other than Section 412, where national security is a key concept are those that relate to foreign intelligence. The concept of foreign intelligence is the bridge that has permitted national

<sup>102</sup> *Id.* at 9.

<sup>103</sup> Emergency Detention Law art. 9 (1970) (S. Vietnam), attachment to letter of [Ambassador] William E. Colby to Prime Minister Tran Thien Khiem (Oct. 12, 1970) (on file with author in DV Collection, An Tri Folder, 1970).

<sup>104</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 350-53 (2001).

<sup>105</sup> *Id.* For a discussion of sun-setting provisions, see CHARLES DOYLE, SENIOR SPECIALIST, CONGRESSIONAL RESEARCH SERVICE, USA PATRIOT ACT SUNSET: A SKETCH, [www.fas.org/irp/crus/RS21704.pdf](http://www.fas.org/irp/crus/RS21704.pdf).

<sup>106</sup> See *infra* note 268 and accompanying text (“It must be recognized that, in Vietnam . . . preventive detention is a substitute for killing people.”).

security detentions to be written into our federal law. Where in South Vietnam such detentions were permitted due to insurgency, national emergency, and war fought within that nation's borders, now they are permitted in the United States because of an amorphous (congressionally undeclared) "War on Terror" fought everywhere.<sup>107</sup>

U.S. officials since 9/11 have repeatedly stated that terrorism is an utterly new animal, that we are fighting a new kind of war, but this is exactly what officials said about Vietnam.<sup>108</sup> The U.S. has always perceived a need for foreign intelligence, and the two (terrorism and foreign intelligence) have now become inextricably intertwined in our laws. Where foreign intelligence used to be gathered by spying overseas (or on foreign powers and their agents who were here in the U.S.), which was exclusively an Executive Branch function, foreign intelligence investigations since 1978 have been regulated by the Foreign Intelligence Surveillance Act, or FISA, and a special, secret federal court called the FISA Court or FISC, that reviews applications to spy domestically.<sup>109</sup>

While FISA was enacted in order to curb indiscriminate and unreviewable Executive Branch surveillance, the law has led gradually to the very dangerous mixing of criminal law (which provides for the usual constitutional protections) and foreign intelligence law—i.e. FISA (which does not). It has also led to the interchangeability of the terms *foreign intelligence investigation*, *terrorism investigation*, and *national security investigation*. In other words, anything that can be linked to a terrorism investigation is a national security investigation, which naturally involves foreign intelligence. A national security investigation may or may not involve terrorism, but will likely involve application of FISA.

Just about *anything* can be linked to national security. And once linked, the lowered constitutional standards of FISA kick in. This opens the

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<sup>107</sup> The Vietnam War was, from the point of view of Americans, contained within a foreign land which we could, and eventually did, choose to leave in order to cease any immediate danger to us, notwithstanding our justification for being there: that the spread of Communism endangered western democracies.

<sup>108</sup> Colby Statement, *supra* note 25 ("This was a new form of war, called by the Communists a people's war, differing in many important respects from the traditional wars of the past. Its key characteristic was its concentration on the weak points at which the Government made contact with the population, breaking this relationship and building a gradually increasing force to contest the authority and power of the Government."). See also Letter from John Shalikashvili, Gen. (ret.), U.S. Dep't of the Army et al. to Arlen Specter, Senator, U.S. Senate & Patrick Leahy, Sen., U.S. Senate (Jan. 3, 2005), available at [http://www.globalsecurity.org/military/library/report/2005/senate-judiciary-committee-letter\\_03jan2005.htm](http://www.globalsecurity.org/military/library/report/2005/senate-judiciary-committee-letter_03jan2005.htm) ("Repeatedly in our past, the United States has confronted foes that, at the time they emerged, posed threats of a scope or nature unlike any we had previously faced.")

<sup>109</sup> Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801-63 (2000).



door for almost anybody to be investigated and, when considered alongside the detention provision, for almost anybody to be detained.

Again, while the PATRIOT Act detention provisions are intended to permit detentions of only aliens who are thought to be national security risks, it is clear that these provisions set a precedent for government detentions of innocent dissenting citizens and can be extended to those who merely disagree with the government.<sup>110</sup> Indeed, with police actions and prosecutions against grass roots activists increasing, some might argue it is already happening.<sup>111</sup>

### *C. Definitions of National Security: Constitutional Concerns*

A closer look at the definitions of foreign intelligence and national security reveals some ominous threads. Oddly, national security is not defined in FISA (which is, of course, the law that most deals with issues of national security). Rather, it is defined in the immigration laws relating to excludable and removable aliens. National security is there defined as "the national defense, foreign relations, or economic interests of the United States."<sup>112</sup> Something as routine and legally permissible as a workers strike at a Coca Cola plant in Colombia could be construed as a threat under this definition.

Although national security is not defined in FISA, "threats to national security" are set forth in FISA in provisions which establish the basis for coordination between intelligence and law enforcement. These provi-

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<sup>110</sup> See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 5 (2003) ("[W]hat we do to foreign nationals today often paves the way for what will be done to American citizens tomorrow.") See, e.g., *id.* at 7-8, 75-82.

<sup>111</sup> See Bill Quigley, *The St. Patrick's Four and Resistance to the War in Iraq*, COMMONDREAMS.ORG, Mar. 17, 2005, <http://www.commondreams.org/views05/0317-32.htm>; Kurt Nimmo, *Ashcroft's War on Greenpeace: Sailor-Mongering Civil Disobedience*, COUNTERPUNCH (Counterpunch, Petrolia, Cal.), Oct. 24, 2003, available at <http://www.counterpunch.org/nimmo10242003.html>; Press Release, Am. Civil Liberties Union, ACLU Defends Peace Activists Facing Fines Over Iraq Travel Ban (May 26, 2005), available at <http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=18342&c=42>; John S. Friedman, *Spying on the Protesters*, NATION, Sept. 19, 2005, at 4, available at <http://www.thenation.com/doc/20050919/friedman>; Carol Schiffler, Citizens for Legitimate Government, Arresting Dissent (Aug. 8, 2005), [http://www.legitgov.org/front\\_stpete\\_schiffler\\_080805.html](http://www.legitgov.org/front_stpete_schiffler_080805.html); Jay Shaft, *16 Year Old Anti-War Protester Arrested In Palm Harbor, FL*, DAILY KOS, Oct. 25, 2005, <http://muledriver.dailykos.com/storyonly/2005/10/25/19357/102>. For a list of (and links to) articles on harassment of anti-war protesters, see Stpete-forpeace.org, Media Coverage of Situation at Baywalk, <http://stpete-forpeace.org/baywalk.media.coverage.2005.html>.

<sup>112</sup> 8 U.S.C. § 1189(c)(2) (2000) (authorizing designation of foreign terrorist organizations by the Secretary of State).

sions use the identical language as that used in defining foreign intelligence information, discussed in the next paragraph.<sup>113</sup>

Foreign intelligence information (and therefore a “threat to national security”) is:

[I]nformation that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.<sup>114</sup>

This type of foreign intelligence information is sometimes called “protective” or “counterintelligence” information. It requires the type of activity we usually think of spies engaging in.

A second definition of foreign intelligence information in FISA includes information relevant or necessary “to the national defense or the security of the United States” or “the conduct of the foreign affairs of the United States.”<sup>115</sup> According to the FISA Review Court: “This definition generally involves information referred to as ‘affirmative’ or ‘positive’ foreign intelligence information rather than the ‘protective’ or ‘counterintelligence’ information . . . .”<sup>116</sup> This type of intelligence is a much vaguer, more expansive type of information. Just about anything could be relevant to the national defense or conduct of foreign affairs. Indeed, by this definition, the Phoenix Program was a foreign intelligence operation, designed ultimately to identify the managers of the insurgency in North Vietnam.

With either type of intelligence, it is important to remember that such information is gathered for the purpose of protecting the interests of the nation, not for bringing criminal prosecutions. This distinction is important when you consider that intelligence information is not protected by the Fourth Amendment probable cause requirement. In other words, those gathering information under a foreign intelligence investigation do not have to provide a judge with evidence of probable cause of criminal activity in order to obtain a warrant, although information obtained via a FISA warrant *can* nonetheless be used in a criminal prosecution.

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<sup>113</sup> See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, §§ 504, 901, 115 Stat. 272 (codified as 50 U.S.C. §§ 1806(k), 1825(k) (2000)).

<sup>114</sup> 50 U.S.C. § 1801(e)(1)(A)-(C) (2000).

<sup>115</sup> *Id.* § 1801(e)(2).

<sup>116</sup> *In re Sealed Case*, 310 F.3d 717, 723 n.9 (FISA Ct. Rev. 2002), available at [www.fas.org/irp/agency/doj/fisa/fiscr111802.html](http://www.fas.org/irp/agency/doj/fisa/fiscr111802.html).

The FISA Review Court, convened for the first time in history in 2002 to review a FISA Court decision on the interpretation of the PATRIOT Act provision relating to the proper standard for FISA warrants, noted that certain FISA definitions do require criminal activity.<sup>117</sup> While FISA does not require probable cause of criminal activity, it does require probable cause that the target is a foreign power or an agent of a foreign power.<sup>118</sup> Thus, the FISA Review Court noted:

The definition of an agent of a foreign power, if it pertains to a U.S. person . . . is closely tied to criminal activity. The term includes any person who “knowingly engages in clandestine intelligence gathering activities . . . which activities involve or may involve a violation of the criminal statutes of the United States,” or “knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor [sic].”<sup>119</sup>

While the Court draws much of its subsequent analysis from its observation that foreign intelligence warrants do, after all, relate to criminal activity, it nonetheless notes that: “The term ‘foreign power,’ . . . is not defined [in FISA] solely in terms of criminal activity. For example, although the term includes a group engaged in international terrorism, which would involve criminal activity, it also includes any foreign government.”<sup>120</sup> Thus, even if criminal activity does underlie some FISA warrants, FISA does not require

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<sup>117</sup> *Id.* at 723-24.

<sup>118</sup> *Id.* at 722-23. The Intelligence Reform Act of 2004 added a “lone wolf” terrorist provision to this clause. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6001, 118 Stat. 3638 (codified at 50 U.S.C. § 1801(b)(1)). See Elizabeth B. Bazan, *Intelligence Reform and Terrorism Prevention Act of 2004: “Lone Wolf” Amendment to the Foreign Intelligence Surveillance Act*, CRS REP. FOR CONGRESS, at CRS-2 (Dec. 29, 2004), available at <http://www.fas.org/irp/crs/RS22011.pdf> (“Under the new “lone wolf” provision, a non-United States person who engages in international terrorism or activities in preparation for international terrorism is deemed to be an “agent of a foreign power” under FISA.”). This provision would seem to further undermine the Sixth Amendment protection that requires probable cause of criminal activity to search or seize. Is not international terrorism simply a crime, should not it therefore be treated as criminal activity, and does not the Sixth Amendment then apply?

<sup>119</sup> *In re Sealed Case*, 310 F.3d 717, 723 (FISA Ct. Rev. 2002), available at [www.fas.org/irp/agency/doj/fisa/fiscr111802.html](http://www.fas.org/irp/agency/doj/fisa/fiscr111802.html) (citations omitted). The court continued:

International terrorism refers to activities that “involve violent acts or acts dangerous to human life that are a violation of the *criminal laws* of the United States or any State, or would be a *criminal violation* if committed within the jurisdiction of the United States or any State.” Sabotage means activities that “involve a violation of chapter 105 of [the criminal code], or that would involve such a violation if committed against the United States.” For purposes of clarity in this opinion we will refer to the crimes referred to in section 1801(a)-(e) as foreign intelligence crimes.

*Id.* (citations omitted).

<sup>120</sup> *Id.* at 738 n.21 (citations omitted).

proof of such activity (rather it assumes it), and the predetermined underlying criminal activity inherent in the definition is no justification for allowing a lack of probable cause of criminal activity standard in cases that eventually become criminal prosecutions. Exactly the opposite, one would think.

Astonishingly, the FISA Review Court itself acknowledged that the constitutional question of whether FISA strikes the right balance “has no definitive jurisprudential answer” and that “to the extent a FISA order comes close to meeting [the requirements of federal criminal law], that certainly bears on its reasonableness under the Fourth Amendment.”<sup>121</sup> In any case, they declined to decide the issue. The Court concluded that “the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.”<sup>122</sup>

Thus, where the parameters of foreign intelligence and national security are tested daily and the privacy of both aliens and citizens alike is at stake, where intelligence information could lead to an individual being certified under Section 412 or designated as an enemy combatant and thereafter indefinitely detained without access to an attorney or court of law, the FISA Review Court judges have determined that they cannot determine the difference between a warrant that meets Fourth Amendment standards or one that simply “comes close.”

## V. DETENTIONS UNDER PRESIDENTIAL AUTHORITY

### *A. Combatant Detentions: Military Commissions and Unlawful Enemy Combatants*

Bush cited Congress’ September 18, 2001, Authorization for Use of Military Force (“AUMF”)<sup>123</sup> and his authority as Commander-in-Chief to justify his Military Order of November 13, 2001.<sup>124</sup>

The AUMF authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”<sup>125</sup>

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<sup>121</sup> *Id.* at 746, 742.

<sup>122</sup> *Id.* at 746.

<sup>123</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>124</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).

<sup>125</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The Military Order is titled: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."<sup>126</sup> It authorizes the detention of any individual whom Bush determines "there is reason to believe . . . is or was a member of the organization known as al Qaida; [or] has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy."<sup>127</sup>

Detention authority is provided in Section 3 of the Order.<sup>128</sup> It declares that individuals subject to the order shall be "treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria," "afforded adequate food, drinking water, shelter, clothing, and medical treatment," and "allowed the free exercise of religion consistent with the requirements of such detention."<sup>129</sup>

The Order also includes a provision that detainees will be "detained in accordance with such other conditions as the Secretary of Defense may prescribe."<sup>130</sup> No limits on detention are included, nor provision for the right to legal representation, or other basic human rights guarantees under either the U.S. Constitution or international humanitarian law, no provisions for standards of evidence and proof, no court review, due process, or habeas corpus.<sup>131</sup>

It took the Department of Defense four months to establish procedures for military tribunals. On March 21, 2002, it issued Military Commission Order No. 1 ("MCO") providing "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism."<sup>132</sup>

However, in the meantime hundreds of men had already been held in indefinite detention at Guantanamo, Abu Ghraib and other locations, and, as has become increasingly clear from news reports, untold numbers had already been tortured and in some cases murdered at the hands of their captors.<sup>133</sup>

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<sup>126</sup> 3 C.F.R. 918.

<sup>127</sup> *Id.* at 919.

<sup>128</sup> *Id.*

<sup>129</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 919 (2001).

<sup>130</sup> *Id.*

<sup>131</sup> *See* 3 C.F.R. 918.

<sup>132</sup> U.S. Dep't of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions for Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. 9.1-9.12 (2004).

<sup>133</sup> *See Prisoner Deaths in U.S. Custody*, ASSOCIATED PRESS, Mar. 16, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/03/16/national/w113007S95.DTL>;

In any case, certification under the Military Order did not work well enough. Although it provided for written certification of al Qaeda terrorists, by the time the MCO was issued, Defense Department officials “indicated they would hold the Guantanamo prisoners indefinitely and on different legal grounds” than the Military Order provided for—as ‘enemy combatants’ in a war against the United States.”<sup>134</sup>

The reason was apparently that “intelligence officers began reporting back to the Pentagon that they did not have enough evidence on most prisoners to even complete the [certification] forms” required by the Military Order.<sup>135</sup> Thus, where there was not enough evidence to detain under the Presidential Military Order certification process or for that matter to detain on pending criminal charges, new, different legal grounds, based solely on the President’s determination—the unlawful enemy combatant designations—were simply substituted.<sup>136</sup>

The enemy combatant designations have been applied to both non-citizen detainees at Guantanamo and to several American citizens being detained at military brigades in the United States. The Administration argued that enemy combatants had no due process or habeas corpus rights whatsoever. The Supreme Court disagreed, handing down its landmark decision in *Hamdi v. Rumsfeld*,<sup>137</sup> in which the Court ruled that a U.S. citizen enemy combatant captured on a battlefield abroad in combat against U.S. forces was entitled to have his status determined by a neutral decision maker. The same day the *Hamdi* decision was handed down, the Court also decided in *Rasul v. Bush*<sup>138</sup> that Guantanamo detainees also had some due process rights and a habeas corpus right to file in any U.S. federal court. The *Rasul* decision led to the Defense Department establishing the “Combatant Status Review Tribunals” (“CSRT”), which some feel fail to satisfy even the minimum standards of due process required either by *Rasul* or *Hamdi*.<sup>139</sup>

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Josh White, *Reported Abuse Cases Fell After Abu Ghraib*, WASH. POST, Mar. 17, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A42007-2005Mar16.html>; *One Year After the Abu Ghraib Torture Photos: U.S. Government Response 'Grossly Inadequate'*, HUMAN RIGHTS FIRST, Apr. 26, 2005, [http://www.humanrightsfirst.org/us\\_law/etr/statements/abu-yr-042605.htm](http://www.humanrightsfirst.org/us_law/etr/statements/abu-yr-042605.htm).

<sup>134</sup> Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1, available at <http://www.nytimes.com/2004/10/25/international/worldspecial2/25gitmo.html> [hereinafter Golden, *Officials Split over MTs*].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>138</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>139</sup> Under *Hamdi*, detainees may challenge their detention before a “neutral decision-maker.” *Hamdi*, 542 U.S. at 509. *Hamdi* addressed in *dicta* what kind of procedure *might* satisfy a challenge to detention, suggesting the procedures set forth in Army Regulation 190-8, § 1-6, which provides for battlefield hearings to resolve doubts about the legal status of

## VI. SOME PROCEDURAL COMPARISONS

A. *Screenings & Status Review Procedures*

Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (also called the Third Geneva Convention and often abbreviated "GPW"), states: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," are POW's, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."<sup>140</sup>

As we indicated earlier, until after the Supreme Court decision in *Rasul*, President Bush refused to accord detainees the protections of POW status or even to afford them any status hearing at all. Similarly, in Vietnam, officials declared that Geneva Common Article 3, common to all four of the Geneva Conventions, applied "only to sentencing for crimes and [did] not prohibit a state from interning civilians or subjecting them to emergency detention when such measures are necessary for the security or safety of the state."<sup>141</sup>

Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>142</sup> Article 3 has, according to one commentator, "been described as 'a convention within a convention' to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it."<sup>143</sup>

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detainees captured during combat, and was adopted to satisfy Article 5 of the Third Geneva Convention, discussed below. *Id.* at 538.

<sup>140</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3317, 3324 [hereinafter Geneva III]. See also Paust, *Judicial Power*, *supra* note 2 ("When doubt exists as to whether a person is a POW, such person has the right to have his status 'determined by a competent tribunal.' If any person detained during an armed conflict is not a POW, such person nevertheless benefits from protections under common Article 3 of the Geneva Conventions, which applies today in all armed conflicts and which incorporates customary human rights to due process into the conventions.") (citations omitted).

<sup>141</sup> *Geneva Memo*, *supra* note 25. See also VALENTINE, *supra* note 1, at 378.

<sup>142</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva III, *supra* note 140; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 74 U.N.T.S. 287 [hereinafter Geneva IV].

<sup>143</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS 9 n.43.

However, as with the Bush Administration, so during Vietnam, "the United States and South Vietnamese Governments . . . agreed that humanitarian treatment must be accorded to all persons," and ultimately, when its hand was forced, the U.S. acknowledged that there were "aspects of the 'an tri' procedure [that] raise[d] some problems which give us concern."<sup>144</sup> Officials testified, however, that the procedures were being improved to "accord with fundamental concepts of due process, and to improve the conditions of internment."<sup>145</sup>

By 1971 the United States Military Assistance Command in Vietnam ("MACV") had instituted screening procedures to precede the detention proceedings.<sup>146</sup> Like the screening procedures in use now at Guantanamo, it is doubtful whether these procedures satisfied Geneva's requirements.

### 1. An Tri

In 1966, MACV first issued a directive pertaining to the determination of POW status. Under this directive, identifiable North Vietnamese Army and Vietcong fighters were accorded POW status upon capture.<sup>147</sup> For all others, a screening procedure was employed. So-called "Combined Tactical Screening Centers" were "activated." Screenings were to be conducted at the "lowest echelon of command practical."<sup>148</sup>

According to Congressional Research Service attorney Jennifer Elsea, "the first implementation of written procedures for . . . tribunals" under Article 5 of the Third Geneva Convention since Geneva's signing in 1949, was set forth in this 1966 MACV directive.<sup>149</sup> However, it is clear that, in fact, the directive grew out of official intent to *evade* Geneva's requirements while satisfying Congress that the U.S. was *trying* to comply "despite the anomalies created by attempting to apply rules essentially designed for a World War II situation to one involving a political, subversive infrastructure."<sup>150</sup>

All detainees were to be classified as either prisoners of war or non-prisoners of war. Non-POW's were either civil defendants, returnees, or

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<sup>144</sup> *Geneva Memo*, *supra* note 25, at 217.

<sup>145</sup> *Id.* at 217, 218.

<sup>146</sup> See Headquarters, U.S. Military Assistance Command, Vietnam, Directive No. 381-46, Dec. 27, 1967, in *U.S. Assistance Programs in Vietnam: Hearings Before S. Comm. Of the Comm. On Gov't Operations*, 92nd Cong., 1st Sess. 218 (1971) (attachment to statement by William Colby) [hereafter *MACV Directive 381-46*].

<sup>147</sup> *Id.* at 218.

<sup>148</sup> *Id.* at 218-19.

<sup>149</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-35.

<sup>150</sup> *Geneva Memo*, *supra* note 25, at 218.



innocent civilians. Returnees were persons who, regardless of past membership in any combat force, voluntarily submitted to the "control" of the Government of Vietnam. Civil defendants were not entitled to POW status but were subject to trial for offenses against Vietnamese laws. These included spies, saboteurs, and terrorists.

Detainees were defined as "[p]ersons who have been detained but whose final status has not yet been determined."<sup>151</sup> This rule, as Valentine's book reveals, did not describe reality, as persons who might meet any of the classifications, including POWs, could be and routinely were detained indefinitely and tortured during that detention.<sup>152</sup>

The directive declared that "[s]uch persons are entitled to humane treatment in accordance with the provisions of the Geneva Conventions" as if the declaration brought the U.S. fully into compliance with Geneva and made further compliance unnecessary.<sup>153</sup> Those who were not regular North Vietnamese or Vietcong soldiers—in other words, "irregulars"—were accorded POW status, if caught in combat and not engaging in terrorism, sabotage, or spying.<sup>154</sup> Such irregulars included: guerrillas, self-defense forces, and secret self-defense forces.

Although the MACV directive does not so state, evidently those who were not obviously POWs were given a status determination hearing. According to Elsea, "those not treated as POWs were treated as civil defendants, and were accorded the substantive and procedural protections" of Geneva.<sup>155</sup> Again, however, we know that many of these civilian defendants languished interminably in the An Tri prisons.

In determining status, "[e]xploitation of human sources, documents, materiel [sic], and other intelligence requirements incident to the effective screening and classification of detainees will normally be accomplished by intelligence personnel of the participating elements" and "[m]aximum use must be made of interrogators and interpreters to conduct initial screening and segregation at the lowest possible level."<sup>156</sup>

These threshold procedures appear to resemble those used by the Bush Administration since *Rasul*. The MACV directive notes that the "detaining unit" was to "insure that the proper documentation [was] initiated and maintained on every individual" and that "data reflect circumstances of

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<sup>151</sup> MACV Directive 381-46, *supra* note 146, at 220.

<sup>152</sup> See VALENTINE, *supra* note 1, at 33, 74, 84. See also FRANK SNEPP, DECENT INTERVAL 31-38 (1978) (detailed account of the detention, interrogation and murder of prisoner of war Nguyen Van Tai, identified as a former deputy minister of "public security" in North Vietnam in charge of the counterespionage and terrorism network in Saigon).

<sup>153</sup> MACV Directive 381-46, *supra* note 146, at 220.

<sup>154</sup> *Id.*

<sup>155</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-35.

<sup>156</sup> MACV Directive 381-46, *supra* note 146, at 220.

capture and whether documents o[r] weapons were found on the detainee.”<sup>157</sup> The hearings were clearly one-sided, weighted in favor of detention, and assumed accuracy of intelligence and the detaining unit’s documentation. No provision appears to have been made at these screening hearings for the detainee to present evidence in his favor, for legal representation, proper standards of proof, or other traditional due process protections.

## 2. Combatants in War on Terror

Guantanamo screening procedures came about, like those in Vietnam, only after public clamor<sup>158</sup> and two Supreme Court decisions: *Hamdi* and *Rasul*. But, despite these two rulings, government attorneys continued to argue that although detainees may have a right to *some* due process in challenging their detentions, all the process that was due was “a right to appear before a panel set up entirely within the military, run by officers, under rules that allow the detainee no lawyer and no assurance of access to all the facts about their capture and detention.”<sup>159</sup> The combatant status review tribunals (“CSRTs”) were purportedly erected to satisfy the Supreme Court’s dictates, but Amnesty International expressed its opinion that “the CSRT process may have been devised as an attempt by the government to narrow the scope of any judicial review.”<sup>160</sup>

Senator Patrick Leahy noted that the Administration established the CSRTs “only after being rebuked by the Supreme Court in *Rasul v. Bush*,” and the procedures only “affirmed the ‘enemy combatant’ status of the Guantanamo detainees based on secret evidence to which the detainees were denied access, raising serious questions about the fairness of the process.”<sup>161</sup>

Moreover, revelations that CSRT commissioners ignored classified exculpatory evidence has brought further taint to these procedures.<sup>162</sup>

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<sup>157</sup> *Id.* at 219.

<sup>158</sup> For a discussion of public criticism of Phoenix, see VALENTINE, *supra* note 1, at 308, 312, 315-26.

<sup>159</sup> Lyle Denniston, *Defeat So Sweet: The Bush Administration's Strange Insistence That It Won the Detainee Cases*, SLATE, Dec. 10, 2004, <http://www.slate.com/Default.aspx?id=2110910&>.

<sup>160</sup> Press Release, Amnesty Int’l, Guantánamo: Military Commissions - Amnesty International Observer's Notes From Proceedings—No. 2, *available at* <http://www.amnestyusa.org/waronterror/document.do?id=80256DD400782B8480256F430046F7CE>.

<sup>161</sup> Patrick Leahy, Senator, U.S. Senate, Statement on the Detention Center at Guantanamo Bay, Cuba, (June 30, 2005), *available at* <http://leahy.senate.gov/press/200506/063005b.html>.

<sup>162</sup> Jim Lobe, *Guantanamo Military Commissions Continue Down Rocky Path*, ONEWORLDNET, Nov. 8, 2004, <http://www.oneworld.net/article/view/97459/1/>. See also Carol D. Loennig, *Panel Ignored Evidence on Detainee: U.S. Military Intelligence, German*

### a. Screenings Before *Rasul*

Before *Rasul*, there were actually two sets of screening mechanisms: one for Guantanamo detainees and another for U.S. citizen "unlawful enemy combatants." Neither mechanism allowed the detainee to contribute to the record or mount any defense. In both situations, the government maintained unilateral control over the entire process, playing accuser, prosecutor, judge, and executioner.

#### i. Guantanamo Screenings Before *Rasul*

For the Guantanamo detainees, cases were reviewed by "an integrated team of interrogators, analysts and regional experts" who "assessed [the detainees] according to the threat posted to U.S. national security and the security of our friends and allies."<sup>163</sup> The U.S. Southern Command then made a recommendation which was forwarded to "an interagency committee in Washington," where the decision was made about whether to hold, transfer, or release the individual. The Administration planned to provide for yearly review, during which each detainee would have the opportunity to "present information on his behalf" to a "board" that would "consider all available information including that provided by foreign governments."<sup>164</sup>

At no time in this process are detainees permitted to provide any defense or exculpatory evidence.

#### ii. Screenings of U.S. Citizens before *Rasul*

Before *Rasul*, the process for U.S. citizens captured within the U.S. who "may be an al Qaeda operative and thus may qualify as an enemy combatant" was similar to the Guantanamo mechanism: "information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant."<sup>165</sup>

Further, "[o]ptions often are narrowed by the type of information available, and the best course of action in a given case may be influenced by

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*Authorities Found No Ties to Terrorists*, WASH. POST, Mar. 27, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A3868-2005Mar26.html>.

<sup>163</sup> Donald H. Rumsfeld, Sec'y of Def., U.S. Dep't of Def., Remarks Before the Greater Miami Chamber of Commerce (Feb. 13, 2004), available at <http://www.defenselink.mil/speeches/2004/sp20040213-secdef0883.html> [hereinafter Rumsfeld Remarks].

<sup>164</sup> *Id.*

<sup>165</sup> Gonzales Remarks, *supra* note 3.

numerous factors including the assessment of the individual's threat potential and value as a possible intelligence source."<sup>166</sup>

When criminal prosecution or detention as a material witness were "on balance, less-than-ideal options as long-term solutions to the situation," the Administration would then "initiate some type of informal process to present to the appropriate decision makers the question whether an individual might qualify for designation as an enemy combatant."<sup>167</sup> But even then, "this work is not actually commenced unless the Office of Legal Counsel at the Department of Justice has tentatively advised, based on oral briefings, that the individual meets the legal standard for enemy combatant status."<sup>168</sup> That definition of an enemy combatant, according to the Administration, is an individual who "has become a member or associated himself with hostile enemy forces."<sup>169</sup>

The Administration provided a narrative flowchart of the "screening" procedure then in use. First, the Director of Central Intelligence made a written assessment, which was transmitted to the Secretary of Defense, who made his own evaluation, which was then provided to the Attorney General, who then transmitted his advice back to the Defense Secretary (along with a memorandum from the Criminal Division of the Department of Justice that included information from the FBI and "other sources" and a formal opinion from the Office of Legal Counsel), all of which then went to White House lawyers and the Counsel to the President, who then forwarded it to the President, who made the final designation decision.<sup>170</sup>

According to the Administration, this lengthy description was intended to show that "executive branch decision making is not haphazard, but elaborate and careful" in order to ensure that "the President's Commander-in-Chief authority is exercised in a reasoned and deliberate manner."<sup>171</sup> Nonetheless, the description issued only a few months before the *Hamdi* and *Rasul* decisions, did little to address concerns and, in any event, the Supreme Court put an end to the processes.

After the two Supreme Court decisions came down, the Department of Defense established the Combatant Status Review Tribunals.

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* The Administration cited *Ex parte Quirin*, 317 U.S. 1 (1942), as the "standard" used for this determination. For an excellent overview of this case, see Louis Fisher, *Military Tribunals: The Quirin Precedent*, CRS REP. FOR CONGRESS, at CRS-8 (Mar. 26, 2002), available at <http://www.fas.org/irp/crs/RL31340.pdf>.

<sup>170</sup> See Gonzales Remarks, *supra* note 3.

<sup>171</sup> *Id.* at 9.

### iii. Screenings in Iraq

Although news reports revealed a massive lack of adequate procedures and guidance for interrogations at Abu Ghraib, little has been reported about the screening, detention, or trial procedures. Some of the procedures used in the Iraq war theater are detailed in documents obtained from the Department of Defense by the American Civil Liberties Union via a Freedom of Information Act request.<sup>172</sup>

According to one undated (ca. 2003-04) document titled "Detainee Process," if a detainee was determined (by what method, the documents do not say) to have high "intelligence value," he would immediately be transferred to the "Division Central Collection Point" in Tikrit, Iraq.<sup>173</sup> If he was determined to have no intelligence value "from and/or through interrogations," he would be "tried for the violations listed," apparently at the regional "collection point."<sup>174</sup> Proceedings were conducted "based on a summary courts martial model."<sup>175</sup> If the detainee had no intelligence value and was not found to have committed any other violations, he was released.<sup>176</sup> Reasons for delay in a detainees transfer or release was generally missing or incomplete information.<sup>177</sup>

A flow chart for "Detainee Processing" at Tikrit, Iraq, lists the steps to be followed: individual detained, capturing unit complete paperwork, detainee arrives at one of the regional collection point detention facilities, detainee is screened "by CI," packet is completed.<sup>178</sup> If a detainee had "intel value" or otherwise warranted further detention, he was sent to the Division Central Collection Point in Tikrit.<sup>179</sup>

At Tikrit, detainee screening was conducted only at "three designated interrogation tents."<sup>180</sup> One side was to be kept open at all times unless there was a military police officer inside.<sup>181</sup>

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<sup>172</sup> American Civil Liberties Union, *Torture Documents Released Under FOIA*, by Department of Defense (Apr. 7, 2005) [hereafter *ACLU, Torture Documents*]. An index of these documents is available at: <http://www.aclu.org/torturefoia/released/041405/>. The relevant documents here are at [http://www.aclu.org/torturefoia/released/041405/2015\\_2164.pdf](http://www.aclu.org/torturefoia/released/041405/2015_2164.pdf). Page numbers cited here are to the stamped page numbers used by the ACLU. For undated documents, dates are estimated by dates on surrounding documents and may be unreliable.

<sup>173</sup> *Id.* at 002073.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 002074.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 002154 (Memorandum from Provost Marshal, Military Police for Record, DCCC Guidelines for the Interrogation of Prisoners (Oct. 11, 2003)).

<sup>181</sup> *Id.*

One officer explained to superiors that detainees are most susceptible during the first few hours after capture:

The prisoners are captured by Soldiers, taken from their familiar surroundings, blindfolded and put into a truck and brought to this place (Abu Ghraib); and then they are pushed down a hall with guards barking orders and thrown into a cell, naked; and that not knowing what was going to happen or what the guards might do caused them extreme fear.<sup>182</sup>

Detainee categories in the Iraq theatre are very similar to those in Vietnam. Category I is high level enemy prisoners of war ("EPWs"), detained persons, civilian internees, including "black list individuals," suspected war criminals, and "violators of UN Resolutions whose broad or specific knowledge makes it necessary for them to be questioned without delay by specially qualified interrogators or debriefers."<sup>183</sup> Category IA are mid-level EPWs, detained persons, civilian internees, including:

[G]rey list individuals whose broad or specific knowledge of regional and national level Ba'ath Party and Fedayeen activities, leadership and cell structure, identities of members, recruiting, intelligence capabilities, financing, training, planning, communications and/or locations, makes it necessary for them to be questioned without delay by operationally focused interrogators. Also includes persons suspected of affiliation with terrorist organizations, foreign intelligence services and foreign fighters.<sup>184</sup>

Both Category A and A1 detainees are transferred immediately to the Task Force Central Collection Point in Tikrit. Category A1 detainees are processed and thereafter transferred to the Coalition Interrogation Facility at Baghdad Airport.<sup>185</sup>

According to one army investigation: "At first, at Abu Ghraib and elsewhere in Iraq, the handling of detainees, appropriately documenting their capture, and identifying and accounting for them, were all dysfunctional processes, using little or no automation tools."<sup>186</sup> The senior investigating officer, Anthony Jones, noted, "When policies, SOPs [standard operating procedures], or doctrine were available, Soldiers [sic] were inconsistently following them. In addition, in some units, training on standard pro-

<sup>182</sup> FAY, INVESTIGATION, *supra* note 72, at 63 (statement of SFC Walters, member of the Fort Huachuca Mobile Training Team, June 21, 2004).

<sup>183</sup> ACLU, *Torture Documents*, *supra* note 172, at 002091.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> ANTHONY R. JONES, LIEUTENANT GEN., U.S. DEP'T OF THE ARMY, ARMY REGULATION 15-6 REPORT, INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 21 (2004) [hereinafter JONES, INVESTIGATION], available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

cedures or mission tasks was inadequate.”<sup>187</sup> However, Jones added, “In my assessment, I do not believe that multiple policies resulted in the violent or sexual abuses discovered at Abu Ghraib. However, confusion over policies contributed to some of the non-violent and non-sexual abuses.”<sup>188</sup>

Finally, Jones pointed out several additional pertinent elements of the Abu Ghraib detention situation. First were the detainees that “were accepted from other agencies and services without proper in-processing, accountability, and documentation,” who were referred to as “ghost detainees.”<sup>189</sup> Second, Jones remarked about the “systemic lack of accountability for interrogator actions and detainees [that] plagued detainee operations in Abu Ghraib.” Finally, Jones noted:

Although the FBI, JTF-121, Criminal Investigative Task Force, [Iraq Survey Group], and the [Central Intelligence Agency] (CIA) were all present at Abu Ghraib, the acronym “Other Government Agency” (OGA) referred almost exclusively to the CIA. CIA detention and interrogation practices led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib.<sup>190</sup>

Most importantly, “local CIA officers convinced military leaders that they should be allowed to operate outside the established local rules and procedures.”<sup>191</sup> Many of the features noted here describe relatively normal military detentions.

#### b. Screenings After *Rasul*

It is doubtful whether CSRTs have been applied to citizen detainees, but as of July 2005, they were completed at Guantanamo for all detainees.<sup>192</sup>

The CSRTs are administrative rather than adversarial, but each detainee may present “‘reasonably available’ evidence and witnesses to a panel of three commissioned officers to try to demonstrate that the detainee does not meet the criteria to be designated.”<sup>193</sup>

“CSRT procedures are modeled on the procedures of Army Regulation (AR) 190-8.”<sup>194</sup> The AR divides captives into four classes: enemy pris-

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<sup>187</sup> *Id.* at 22.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> FAY, INVESTIGATION, *supra* note 72, at 52-53.

<sup>191</sup> JONES, INVESTIGATION, *supra* note 186, at 9.

<sup>192</sup> Elsea, *Guantanamo Detainees*, *supra* note 33, at CRS-2.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at CRS-2 n.6.

oners of war, retained personnel (chaplains, medical personnel, Red Cross), civilian internees, and other detainees.<sup>195</sup> Under AR, the preliminary determination of status is made on the battlefield; those made under CSRT procedures clearly are not. AR provides that the reviewing panel decides by a majority vote on the preponderance of evidence whether an individual should be detained.<sup>196</sup>

According to Human Rights First, the “tribunals that will conduct detainees’ status hearings are not neutral” and fail to satisfy the Supreme Court’s rulings in either *Rasul* or *Hamdi*.<sup>197</sup> Human Rights First notes:

While tribunal officers are to have had no previous connection with the apprehension, detention, or interrogation of the detainees, this condition is no guarantee of neutrality. A finding in favor of the detainee would require the officer to challenge determinations made by his or her entire chain of command, including the President, who, in an “order” issued February 7, 2002, “determine[d] that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war . . . [and likewise] note[d] that . . . al-Qaida detainees also do not qualify as prisoner[s] of war.” Moreover, the tribunals may only affirm the original “enemy combatant” designation, or determination, and they do not have the option to declare a detainee a “lawful combatant/prisoner of war.”<sup>198</sup>

Human Rights First claims that the status hearings “do not even measure up to the military regulation they claim to mirror,” which established, by contrast, “no institutional interest . . . in the outcome of any particular individual’s hearing” even in battlefield hearings.<sup>199</sup>

The CSRTs are not bound by rules of evidence that would apply in federal court, or even in a court martial. The government’s evidence is presumed to be “genuine and accurate.” The government is required to present all of its relevant evidence. The detainee’s “personal representative,” who is assigned to him, may view classified information but does not act as legal counsel, since the representative need not possess any professional training and communications are not confidential—a fact of which detainees are apparently not informed.<sup>200</sup>

Human Rights First points out that the fact that if status hearings had been “held at the time of capture [and] determined that an individual

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<sup>195</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-36.

<sup>196</sup> *Id.* at CRS-36-37.

<sup>197</sup> HUMAN RIGHTS FIRST, HUMAN RIGHTS FIRST ANALYZES DOD’S COMBATANT STATUS REVIEW TRIBUNALS (Aug. 2, 2004), [http://www.humanrightsfirst.org/us\\_law/detainees/status\\_review\\_080204.htm](http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm) [hereinafter HUMAN RIGHTS FIRST ANALYZES].

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* See also Elsea, *Guantanamo Detainees*, *supra* note 33, at CRS-3.



was a noncombatant, his deportation to Guantanamo . . . would have been a grave breach of the [Geneva] Convention."<sup>201</sup>

All in all, the War on Terror screening procedures share many, if not most, of the features of the Vietnam screenings; these can be most easily summed up as violating Articles 3 and 4 of the Third Geneva Convention. The rationales for the structure of these screening procedures also seems to be similar: that fighting a new and vicious enemy who does not follow the laws of war himself excuses us from following those laws ourselves, in particular the so-called "Geneva law" that emphasizes human rights and responsibilities.<sup>202</sup>

### *B. Detention Procedures*

#### *1. An Tri Tribunal Procedures*

A contemporary Department of State handbook of Vietnamese national security laws sets forth the An Tri procedures in detail.<sup>203</sup> The An Tri detention system permitted the rounding up of "Civilian Security Suspects"—those who were thought to be a "[d]anger to National Security"<sup>204</sup>—on the basis of nothing more than "simply . . . the word of an anonymous informer."<sup>205</sup> The U.S. puppet Vietnamese "Security Committee" could "take action on a case even though a criminal act cannot be proven."<sup>206</sup> Members of "infrastructure, various associations, and political cadre, draft evaders, deserters, and those suspected of having violated the laws of the [Republic of Vietnam] will normally be classified as civil defendants and not [prisoners of war]."<sup>207</sup> The procedures for administrative detention were "far less exacting and technical than those of the [regular Vietnamese] courts."<sup>208</sup>

Similar to designated war on terror "unlawful enemy combatant" detainees, "Civilian Security Suspects" could be detained initially for a maximum period of two years, with the potential of renewed periods upon review.<sup>209</sup> Proceedings were closed to the public; the detainee had no right

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<sup>201</sup> HUMAN RIGHTS FIRST ANALYZES, *supra* note 197.

<sup>202</sup> See Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-10.

<sup>203</sup> HARPER, HANDBOOK, *supra* note 40.

<sup>204</sup> *Id.* at 3, 41. See also W. Gage McAfee, *Fact Sheet: Current Status on Law Revisions Post Apprehension Processing at VCI*, 1 (1970) [hereinafter McAfee, *Fact Sheet*] (on file with author in DV Collection, An Tri Folder, 1970).

<sup>205</sup> VALENTINE, *supra* note 1, at 13.

<sup>206</sup> HARPER, HANDBOOK, *supra* note 40, at 9.

<sup>207</sup> VALENTINE, *supra* note 1, at 11.

<sup>208</sup> *Id.* at 14.

<sup>209</sup> *Id.* at 14-15.

to counsel or right to appear personally at his hearing.<sup>210</sup> Civilian security offenders were tried by Special Courts, Security Committees or Military Courts, "in accordance with the emergency Decrees and Decree-Laws which define security offenses and specific the forum."<sup>211</sup> The rules of evidence were "relatively lenient," although an accused, in theory if not in practice, could "rebut such evidence and . . . demand that witnesses whose statements are in the dossier appear personally in court."<sup>212</sup> Evidence had apparently merely to be "sufficient" to "support the arrest, custody, trial and conviction of the suspect," but classified information could be "[brought] to the attention of the court . . . [but] not be incorporated in the official record of the case."<sup>213</sup> Confessions were accepted in evidence, "signed by the accused," and "a substantial number of convictions" were "obtained through confessions."<sup>214</sup>

The procedures in a fourth venue, Military Field Courts—whose "operation . . . received considerable public attention due to the sensational nature of some of the [Vietcong] cases tried there and the gravity of the penalties involved"—were "considerably simplified and abbreviated, particularly as regards the pre-trial investigations."<sup>215</sup> The decisions of such courts were final, without any right of appeal.<sup>216</sup> The compiler of these statistics noted that the "laws and procedures for dealing with security offenders are far from perfect and eventually must be replaced" but "for the present, the emphasis must continue to be on winning the war."<sup>217</sup>

## 2. The Bush Military Commission Procedures

While the Military Order and the Military Commissions Order provide for trials of enemy combatants, nowhere do these orders require that every detainee be tried, and, in fact, as we have seen, the Administration has made it clear that it does not intend to try most detainees, emphasizing that the purpose of these detentions is to keep people off the battlefield. The procedures established for military tribunals, however, presently contain the greatest degree of procedure most detainees will be granted. They also contain a similar mishmash of civil and war "crimes" as the An Tri trial procedures.

<sup>210</sup> *Id.* at 15. See also *Justice in Vietnam*, *supra* note 41, at 44.

<sup>211</sup> HARPER, HANDBOOK, *supra* note 40, at 17; *Justice in Vietnam*, *supra* note 41, at 43.

<sup>212</sup> HARPER, HANDBOOK, *supra* note 40, at 18.

<sup>213</sup> *Id.* at 17.

<sup>214</sup> *Id.* at 17-18.

<sup>215</sup> *Id.* at 19.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 21.

The lower standards of proof, expanded secrecy provisions, denial of judicial review, and the lack of independence from the executive branch go hand-in-hand with and form part of the infrastructure for administrative detentions.

The Military Order, in anticipation of the MCO, stipulates a “full and fair trial” but, as the Congressional Research Service notes, it “contains few specific safeguards that appear to address the issue of impartiality.”<sup>218</sup> The military commission panel sits “as triers of both fact and law.”<sup>219</sup> Evidence may be admitted if, in the opinion of the presiding officer, it has “probative value to a reasonable person.”<sup>220</sup>

An individual subject to the order may be tried only by the commission and “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in any court of the United States, any court of any foreign nation, or any international tribunal.”<sup>221</sup> Jennifer Elsea notes that “[t]he President appears to have complete control over the proceedings.”<sup>222</sup> She continues:

He or his designee decide which charges to press, select the members of the panel, the prosecution and the defense counsel, select the members of the review panel, and approve and implement the final outcome. The procedural rules are entirely under the control of the President or his designees, who write them, interpret them, enforce them, and may amend them at any time.<sup>223</sup>

Procedural safeguards include the right to be informed of charges sufficiently in advance of trial to prepare for defense, presumption of innocence, guilt beyond a reasonable doubt, open hearings (with exceptions), right to counsel (with restrictions, including monitoring of communications and supervision), and right to discovery to the extent necessary and rea-

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<sup>218</sup> Elsea, *DOD Rules for MCs*, *supra* note 34, at CRS-12.

<sup>219</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 9.18, 919-20 (2001).

<sup>220</sup> *Id.* Judge Wallach notes that this is the same standard as was used in the *Quirin* case. See Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT'L L. 541, 548 (2004) (explaining that “[t]hat rule, as applied in World War Two and in the post-war tribunals[,] was repeatedly used to admit evidence of a quality or obtained in a manner which would make it inadmissible under the rules of evidence in both courts of the United States or courts martial conducted by the armed forces of the United States”).

<sup>221</sup> 3 C.F.R. 921.

<sup>222</sup> Elsea, *DOD Rules for MCs*, *supra* note 34, at CRS-12.

<sup>223</sup> *Id.*

sonably available, subject to secrecy determinations.<sup>224</sup> There appear to be no exclusionary rules for admissibility of evidence and no authentication requirements for depositions. The main concern appears to be the need for secrecy rather than fairness of process.

According to Judge Evan J. Wallach, Bush's Military Order "and subsequent statements by the President, Vice President, Attorney General, Secretary of Defense, and the White House Counsel made it clear that the tribunals were intended to follow procedural and evidentiary rules similar to those used to try spies and war criminals during and after the Second World War,"<sup>225</sup> which were

applied in World War Two and in the post-war tribunals [were] repeatedly used to admit evidence of a quality or obtained in a manner which would make it inadmissible under the rules of evidence in both courts of the United States or courts martial conducted by the armed forces of the United States.<sup>226</sup>

Wallach points out further that: "None of the screening processes applied to the Guantanamo detainees, either pre-shipment from Afghanistan, during incarceration, or following the Supreme Court's mandate in *Hamdi*, meets the requisites of Article 5" of the Third Geneva Convention relating to prisoners of war."<sup>227</sup>

Indeed, the MCO procedures were considered inadequate by many, including human rights organizations<sup>228</sup> and even by some of the military officers assigned to prosecute Guantanamo suspects.<sup>229</sup> Three retired military officers, each formerly either a Judge Advocate General or senior legal advisor for a branch of the United States military, jointly filed an *amicus curiae* brief in the consolidated case of *Rasul v. Bush*, stating: "The government should not be permitted, through Executive fiat, to imprison persons indefinitely when no charges have been brought against them and the prisoners are barred from all access to courts and other tribunals to determine their status."<sup>230</sup>

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<sup>224</sup> *Id.* at CRS-13.

<sup>225</sup> Wallach, *supra* note 220, at 547-48.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 563.

<sup>228</sup> See Golden, *Officials Split over MTs*, *supra* note 134. See also Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, U.S. ARMY WAR C. Q., 54, 59-60, available at <http://carlisle-www.army.mil/usawc/Parameters/05autumn/fogarty.htm> (providing a detailed review of Guantanamo and military review of combatants).

<sup>229</sup> See Leigh Sales, *Leaked emails claim Guantanamo trials rigged*, ABC NEWS ONLINE, Aug. 1, 2005, <http://www.abc.net.au/news/newsitems/200508/s1426797.htm>.

<sup>230</sup> Brief for Retired Military Officers as Amici Curiae Supporting Petitioners, *Rasul v. Bush*, 540 U.S. 466 (2004), available at <http://www.ccr-ny.org/v2/reports/docs/RasulRetiredMilitaryOfficersAmicus.pdf>.

Several military defense lawyers filed challenges to the impartiality of the commission judges, three of whom were subsequently removed. The lawyers also filed in federal court challenging the military tribunals.<sup>231</sup> The suit, *Hamdan v. Rumsfeld*, resulted in a November 2004 District of Columbia Circuit Court decision declaring that

unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. 839, petitioner may not be tried by Military Commission for the offenses with which he is charged [and] unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged.<sup>232</sup>

However, on July 15, 2005, the Court of Appeals for the D.C. Circuit overturned the D.C. District Court decision, ruling that Hamdan has no individual right to assert a Geneva violation and that the CSRT, which determined that Hamdan is an enemy combatant subject to indefinite detention, satisfies Geneva's hearing requirement.<sup>233</sup> Hamdan has appealed to the Supreme Court.<sup>234</sup> Neil Katyal, Hamdan's attorney, writes:

The court of appeals, by rejecting longstanding constitutional, international law, and statutory constraints on military commissions, has given the President that power in tribunals that impose life imprisonment and death. Its decision vests the President with the ability to circumvent the federal courts and time-tested limits on the Executive.<sup>235</sup>

He notes that: "This case challenges (1) a commission without explicit Congressional authorization, (2) in a place far removed from hostilities, (3) to

<sup>231</sup> David Goodman, *Friendly Fire: A Military Lawyer Battles the Commissions*, AMNESTY MAG., Summer 2004, available at [http://www.amnestyusa.org/amnestynow/friendly\\_fire.html](http://www.amnestyusa.org/amnestynow/friendly_fire.html); Scott Higham, *Bin Laden Aide Is Charged at First Tribunal—Defense Lawyer Calls Process Unfair*, WASH. POST, Aug. 25, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A28241-2004Aug24.html>; Jonathan Mahler, *Commander Swift Objects*, N.Y. TIMES, June 13, 2004, at A2, available at <http://www.nytimes.com/2004/06/13/magazine/13MILITARY.html>. The brief was filed in the Hamdan case on January 14, 2004.

<sup>232</sup> *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 173-74 (D. D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005).

<sup>233</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

<sup>234</sup> Petition for Writ of Certiorari, *Hamdan v. Rumsfeld*, 126 S.Ct. 622 (2005) (No. 05-184), available at [http://www.law.georgetown.edu/faculty/nkk/documents/8-7-05\\_Cert\\_Peti\\_tion.nk11.pdf](http://www.law.georgetown.edu/faculty/nkk/documents/8-7-05_Cert_Peti_tion.nk11.pdf).

<sup>235</sup> *Id.*

try an offense unknown to the laws of war, (4) under procedures that flout basic tenets of military justice, (5) against a civilian who contests his unlawful combatancy.”<sup>236</sup> And: “The essence of the court of appeals’ contrary position is that while Petitioner has no rights under the Constitution, treaties, common law, and statutes, he is subject to the penalties and pains of each.”<sup>237</sup>

On a somewhat analogous question, on October 5, 2005, the Senate voted 90-9 in favor of an anti-torture statute that would require all interrogations to comply with the Uniform Code of Military Justice.<sup>238</sup> The D.C. Circuit Court of Appeals did not require that the Military Tribunals adhere to the Uniform Code, as the D.C. Circuit Court itself had, but Congress defied the White House’s threatened veto to pass the anti-torture law that requires such adherence.

The Bush detention scheme, like An-Tri, is designed to screen and detain without a regular trial those who are merely suspected of being dangerous to national security. Again like An-Tri, it was set up with the primary purpose of gathering intelligence, or as White House Counsel Alberto Gonzales said, with “a high premium on . . . the ability to quickly obtain information from captured terrorists.”<sup>239</sup>

## VII. THE LAW OF WAR & DETERMINATION OF DETAINEE STATUS<sup>240</sup>

Where the U.S. eventually acknowledged residual responsibility under the Geneva Conventions for the Phoenix detentions in Vietnam (originally having denied all responsibility, saying it was not in charge), the Bush Administration, while stating it would follow the spirit of Geneva, has from the start claimed that Geneva does not apply to most of the detainees, and in any case, that no tribunal other than its own executive decision was needed to determine a detainee’s status.

Bush refused to acknowledge the application of Geneva to terrorist suspects, but White House counsel Alberto Gonzales advised him that “even if [the Geneva Convention] is not applicable, we can still bring war crimes

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<sup>236</sup> *Id.* at 9.

<sup>237</sup> *Id.* at 15.

<sup>238</sup> Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html>.

<sup>239</sup> Memorandum from Alberto Gonzales, Counsel to the President, to George W. Bush, President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at <http://msnbc.msn.com/id/4999148/site/newsweek/> [hereafter Gonzales Memo].

<sup>240</sup> This section relies heavily on Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-10-38, and ABA TASK FORCE REPORT, *supra* note 20 *passim*.

charges against anyone who mistreats U.S. personnel.”<sup>241</sup> This sort of incongruity calls for judicial and congressional scrutiny.

Administration officials have insisted that they are at war and the laws of war apply, and therefore “[t]o state repeatedly that detainees are being ‘held without charge’ mistakenly assumes that charges are somehow necessary or appropriate.”<sup>242</sup> Detention, they emphasize, is not an act of punishment, but one of security and military necessity.

The Bush Administration is correct that the laws of war provide for detention of enemy combatants where feasible, that such detentions are not intended as punishment, and that wartime detentions last for the duration of the conflict. But there are many assumptions made by the Administration that are glossed over by the position it has taken relative to detainees. For one thing, if the laws of war and not the laws of criminal justice apply, the Executive does not merely gain powers, it also acquires additional responsibilities. And even without those additional responsibilities, the President’s powers are not unlimited or beyond question. The law of war places on the Executive responsibilities that are nonderogable. It also grants rights to combatants that are nonderogable by any power.

There are two branches of the laws of war: the older one is sometimes called the “Hague law,” after the Hague Conventions of 1899<sup>243</sup> and 1907,<sup>244</sup> which prescribes the rules of engagement during combat and is based on the key principles of military necessity and proportionality, and the newer “Geneva law,” after the Geneva Conventions of 1929<sup>245</sup> and 1949,<sup>246</sup> which emphasizes human rights and responsibilities, including the humane treatment of prisoners.

The law of war is based on the idea of reciprocity—you treat your enemies the way you want them to treat you. Derogation from the rules by one party, however, does not excuse breaches by another. “Were this not the case, any deviation from the letter of the law could be invoked to justify

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<sup>241</sup> Gonzales Memo, *supra* note 239.

<sup>242</sup> Gonzales Remarks, *supra* note 3; *see also* Rumsfeld Remarks, *supra* note 163 (noting detention “is a practice long established under the law of armed conflict for dealing with enemy combatants in a time of war”).

<sup>243</sup> Convention with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803, *reprinted in* 1 AM. J. INT’L L. 129 (Supp. 1907).

<sup>244</sup> Convention Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, *reprinted in* 2 AM. J. INT’L L. 90 (Supp. 1908).

<sup>245</sup> Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929 47 Stat. 2021, *reprinted in* 27 AM. J. INT’L L. 63 (Supp. 1933).

<sup>246</sup> Geneva I, *supra* note 142; Geneva II, *supra* note 142; Geneva III, *supra* note 140; Geneva IV, *supra* note 142.

wholesale abandonment of the law of war, causing the conflict to degenerate into the kind of barbarity the law of war aims to mitigate.”<sup>247</sup>

Further, parties to an armed conflict retain the same rights and obligations without regard to whether they initiated the hostilities or whether their conduct is justifiable under international law.

Thus, President Bush may not excuse the United States from honoring (or applying) the Geneva Conventions or other international treaties applicable in the war on terror on the grounds that the 9/11 attacks were unprovoked or violated the laws of war.

The Administration may not unlawfully or arbitrarily detain terrorist suspects or presumed combatants without proper process. Indeed, although Congress did authorize the use of “all necessary and appropriate force” against the 9/11 terrorists and those who helped them, Congress did not and cannot authorize the abrogation of properly ratified treaties without the appropriate congressional processes, of customary international law, or of violations of the U.S. Constitution. Nor can Congress authorize indefinite detentions simply on the grounds that, as Rumsfeld put it, “they’re dangerous” or “[i]t provides us with intelligence” or even that “[i]t can save lives.”<sup>248</sup>

Under the laws of war, in order to determine the legal status of detainees it is necessary to determine whether an armed conflict exists, and if so, whether it is international or non-international.<sup>249</sup> For the most part, non-international conflicts (that is, civil wars or insurgencies) do not implicate the laws of war.<sup>250</sup> Intervention by a foreign power on the side of insurgents *will* implicate the laws of war.

The Bush Administration has declared that the laws of war, not criminal justice, apply to the present “War on Terror,” but has routinely denied that there are any state actors other than the United States. In other words, the U.S. has refused to recognize the Taliban as the *de facto* government of Afghanistan at the time of 9/11. Jennifer Elsea notes: “Denying that *any* state is involved in the terrorist acts that precipitated the armed conflict could call into question the United States’ treatment of those attacks as violations of the law of war and for treating the global war on terrorism as an international armed conflict.”<sup>251</sup>

Authority to detain enemy combatants rests on the assumption that soldiers pay allegiance to a state and once that state ceases hostilities, so will the soldiers. But what about when those “soldiers” do not pay alle-

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<sup>247</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-11.

<sup>248</sup> Rumsfeld Remarks, *supra* note 163.

<sup>249</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-11.

<sup>250</sup> *Id.*

<sup>251</sup> Elsea, *Battlefield Detainees*, *supra* note 34, at CRS-14.



giance to a state but to a cause? What if the so-called war cannot be won by traditional means?

The ambiguities in the War on Terror—and there are many more: for example, in deciding where exactly the battlefield is, or whether an individual is a combatant or a terrorist, etc.—are not resolved by a unilateral executive decision not to apply Geneva to a certain class of individuals or to indefinitely detain any person who is “captured.”

Even where questions seem to have been easily resolved on the battlefield by ground level combat unit determinations, the ambiguities and uncertainties raised by the War on Terror, far from authorizing less process, should compel more. For example, a combat unit seeking the whereabouts of Bin Laden may detain individuals who might divulge such information but who are otherwise not combatants, members of Al Qaida, or the Taliban. Alternatively, an individual may be a member of the Taliban for religious reasons and never have engaged in any fighting. Should these different individuals be indefinitely detained along with hardened terrorists?

Bush’s advance determinations that all members of the Taliban are enemy combatants not entitled to POW status and all members of Al Qaida are enemy combatants not protected by Geneva<sup>252</sup> are inadequate and liable to gross error. His refusal to provide for any process, even the minimal process required by the Geneva Conventions for status hearings is not only inadequate, it is a grave breach of Geneva and is thus a war crime under 18 U.S.C. section 2441.<sup>253</sup>

One of the darkest truths about both the An Tri detentions and the current administrative detentions of unlawful enemy combatants is that not only did both violate international and domestic laws, but instead that in both cases the U.S. government officials clearly did so *intentionally*.<sup>254</sup>

With respect to Bush Administration policies, two respected law professors, both of whom served in the military, independently concluded that the January 2002 memo by White House Counsel Alberto R. Gonzales and subsequent presidential decisions and authorizations are “evidence of the initiation of a Common Plan to violate the 1949 Geneva Conventions.”<sup>255</sup>

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<sup>252</sup> *Id.* at CRS-1-2. See also Elsea, *Guantanamo Detainees*, *supra* note 33, at CRS-2.

<sup>253</sup> 18 U.S.C. § 2441 (2000).

<sup>254</sup> See VALENTINE, *supra* note 1, at 376 (discussing an interview with Congressional Aide William Phillips in which Phillips claimed that a training manual obtained by a military whistle-blower in 1970, “showed that Phoenix policy” was in violation of the Geneva Convention and “was not something manufactured out in field but was sanctioned by the U.S. government”).

<sup>255</sup> See Paust, *Executive Plans*, *supra* note 24, at 812; see also Jordan J. Paust, *The Common Plan to Violate the Geneva Conventions*, JURIST, May 24, 2004, available at [http://pegc.no-ip.info/paust\\_the\\_plan.html](http://pegc.no-ip.info/paust_the_plan.html); Wallach, *supra* note 220, at 614.

*A. Intentional Violations of the Geneva Conventions*

The Phoenix Program was from the start an unlawful program. It began as a CIA covert operation, ultimately evolving into a program of detentions of dangerous persons, purportedly run by the Vietnamese, but in fact always managed by Americans. Eventually, those in charge—an “old-boy network, a group of guys at highest level . . . who thought they were Lawrence of Arabia”<sup>256</sup>—were required to answer to Congress and conform the program more closely to Geneva requirements. But there was never a full accounting of American transgressions against the Vietnamese.

Similarly, Bush administration rationales and justifications for violating established, time-tested international protections are the same as those used by American officials during Vietnam. Indeed, what one Vietnamese scholar presciently wrote in 1982 could be echoed today: “American politicians have not yet changed their policy . . . . Almost the same people [are applying] the same policy with the same principles and the same spirit.”<sup>257</sup>

As noted earlier, American officials in Vietnam decided that Geneva did not apply to security detainees. Their argument that either the individuals were not “protected persons” under Article 4 of the Fourth Geneva Convention (for protection of civilians) or that Article 3 (common to all the four Geneva Conventions, mandating humanitarian treatment to all persons, even if not protected persons, and forbidding “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”) *did not apply to those who were not charged with a crime* and did “not prohibit a state from internment of civilians or subjecting them to emergency detention when such measures are necessary for the security or safety of the state,”<sup>258</sup> is ominously similar to the reasoning now applied by the Bush Administration.

Based on the argument that the President has the constitutional authority to suspend treaties in certain circumstances or to interpret them to mean that they do not apply to certain persons, President Bush initially decreed that the Geneva Conventions did not apply to al Qaeda (because they were not party to the Conventions) or the Taliban (because they were unlawful enemy combatants not qualifying as prisoners of war).<sup>259</sup>

Judge Wallach notes, “it [is] clear that by the end of January [2002], at least, consideration was being given to conduct which might violate [the Third Geneva Convention’s] strictures regarding the detention and interro-

<sup>256</sup> VALENTINE, *supra* note 1, at 420 (quoting Stan Fulcher, a Phoenix coordinator).

<sup>257</sup> VALENTINE, *supra* note 1, at 421 (quoting NGUYEN NGOC HUY, UNDERSTANDING VIETNAM 85 (1982)).

<sup>258</sup> *Geneva Memo*, *supra* note 25, at 217.

<sup>259</sup> See Wallach, *supra* note 220, at 555-56 n.66, 556-57 n.67, 558-59 n.77, 557.

gation of prisoners of war.”<sup>260</sup> Former White House Counsel Alberto Gonzales —now Attorney General, with all the powers that position entails—advised the President on January 25, 2002 that if the President determined that Geneva did not apply, his decision would render “obsolete Geneva’s strict limitations on questioning of enemy prisoners,” thus “eliminat[ing] any argument regarding the need for case-by-case determinations of POW status,” and insulating the Administration against domestic prosecution for war crimes.<sup>261</sup>

Wallach points out: “Any such approach is incompatible with the core concepts of rule of law, coequal branches of government and separation of powers,”<sup>262</sup> “would fly in the face of every concept of rule of law and regulation of armed conflict developed over the past two hundred years . . . [and] would also be a direct and criminal violation of the standards for minimal conflict in war time developed at Nuremburg.”<sup>263</sup> Wallach also notes, these violations could constitute grave breaches of Geneva, which would constitute a violation of the War Crimes Act of 1996.<sup>264</sup>

The An-Tri detentions arose out of a desperate climate. In Vietnam, American involvement began in the early 1950s, with American soldiers fighting alongside the French.<sup>265</sup> By 1952, American advisers began training Vietnamese units.<sup>266</sup> By 1954, the United States had installed Ngo Dinh Diem, and the CIA was operating a brutal psychological warfare program which later evolved and was incorporated into Phoenix. Arrests and executions of Vietnamese Communists began in 1956 with the notorious Denunciation campaign under Diem.<sup>267</sup> “The campaign was managed by security committees, which were chaired by CIA advised security officers who had authority to arrest, confiscate land from, and summarily execute Communists.”<sup>268</sup>

A State of National Emergency was declared by the Vietnamese puppet government in August 1964 and a State of War in June 1965. A 1972 memo by Ray A. Meyer, an American legal adviser in Vietnam, making recommendations for An-Tri reforms, noted: “It must be recognized

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<sup>260</sup> *Id.* at 554.

<sup>261</sup> *Id.* at 553 (quoting Gonzales Memo, *supra* note 239).

<sup>262</sup> *Id.* at 562 n. 85.

<sup>263</sup> *Id.* at 566.

<sup>264</sup> *Id.* at 573, 619.

<sup>265</sup> VALENTINE, *supra* note 1, at 24.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 28.

that, in Vietnam . . . preventive detention is a substitute for killing people."<sup>269</sup>

But even when "reforms" of the An-Tri system were considered, the U.S. embassy decided to defer making them because of "intractable CIA internal security considerations . . ."<sup>270</sup> and the system was then permanently solidified into "a system of indeterminate terms of detention."<sup>271</sup> Although many of Meyer's recommendations (hearings open to the public, gradual phasing out of An-Tri), were not adopted, the indefinite detention program was retained.<sup>272</sup>

These facts illustrate the original, albeit *ex post facto*, rationale for the indefinite detentions: an alternative to battlefield killing, but it was always a means of gaining and exploiting intelligence. This rationale has now been extended to the global "War on Terror," justifying indefinite detentions of any terrorist suspect, without trial, without any sort of due process or habeas corpus protections, and, prior to the Supreme Court decision in *Hamdi*, without even a legitimate status determination.<sup>273</sup>

The dilemma now, as during Vietnam, is genuine. How to identify and what to do with persons who plan to sabotage and murder civilians? Is this a war or is it an insurgency? What do you do when civilians may be the enemy? Outright assassination of masses of suspect civilians is not only morally repugnant and wrong, but against the laws of war. But, then, what do you do when the insurgency is civilian based? The easy answer is: you "administratively" (but not quite legally) detain.

But indefinite administrative detentions are not the answer, since the reader may recall that the Phoenix Program was not only about detentions—and this is the real crux of the problem with administrative detention programs—Phoenix was in fact originally an assassination program, so that the culture of what came to be known as guerilla or "unconventional warfare,"<sup>274</sup> bled into the detention program, leading to egregious abuses, tor-

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<sup>269</sup> Meyer, *Memo*, *supra* note 61.

<sup>270</sup> VALENTINE, *supra* note 1, at 401.

<sup>271</sup> Meyer, *Memo*, *supra* note 61, at 6.

<sup>272</sup> See VALENTINE, *supra* note 1, at 401.

<sup>273</sup> It is clear from the Geneva Conventions that to determine a prisoner's status as a lawful or unlawful enemy combatant, a court-like hearing is required. See COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 75-76 (Jean C. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/COM/375-590008?OpenDocument> ("[D]ecisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank. The matter should be taken to a court . . . A further amendment was therefore made . . . stipulating that a decision regarding persons whose status was in doubt would be taken by a 'competent tribunal.'").

<sup>274</sup> See JENNIFER VAN BERGEN, *THE TWILIGHT OF DEMOCRACY: THE BUSH PLAN FOR AMERICA* 172, 166-92 (2005).

ture and killing of detainees, exactly what has now been discovered in our treatment of prisoners at Abu Ghraib and other combatant detention centers.

In both cases the justification was identical: these are dangerous terrorists who want to kill us; therefore, the humane alternative to killing them is to indefinitely detain them.<sup>275</sup> The justification makes sense until one realizes that without an adequate screening process, there is no way to tell who is and who is not a dangerous terrorist. American governments and presidents have relied for centuries on intelligence to make such decisions – and that is the underlying basis for making such determinations up to now: i.e., that the President has the authority to determine who is and who is not a dangerous terrorist because the President has access to intelligence. However, unquestioning reliance on the President has throughout history been repeatedly shown to have been misplaced. Intelligence is often based on hearsay, innuendo, and rumor. It is therefore problematic to rely exclusively on intelligence as the means of determining who is dangerous and who is not.<sup>276</sup>

There simply is no fair and thorough process by which a President can make such determinations. For one thing, Presidents must be viewed as one of the primary targets of terrorists and therefore cannot sit in neutral judgment of those they have designated as such. But, even apart from that, the President's job is not a judicial one. His role is to execute the laws, not to decide what the law is.

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<sup>275</sup> Elsea, *Detention of American Citizens*, *supra* note 29 (“The law of war encourages capture and detention of enemy combatants as a more humane alternative [than] to accomplish the same purpose by wounding or killing them. Enemy civilians may be interned for similar reasons ... in order to prevent their acting on behalf of the enemy and to deprive the enemy of resources it might use in its war efforts.”).

<sup>276</sup> See *Najjar v. Reno*, 97 F.Supp.2d 1329, 1355, 1360-62 (S.D. Fla. 2000) (holding that procedural due process rights had been violated insofar as use of classified evidence deprived petitioner of right to fair hearing and noting “substantial risk that the [Immigration Judge] and the [Board of Immigration Appeals] could reach an erroneous or unreliable determination that Petitioner should continue to be detained as a threat to national security”), *vacated as moot sub nom* *Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001); *Kiarelddeen v. Reno*, 71 F.Supp.2d 402, 413, 416-17, 419 (D. N.J. 1999) (granting petitioner's writ of habeas corpus based on challenge to the use of secret evidence and stating that “the INS' reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness”) (discussing speculation that source of government's information was petitioner's ex-wife involved in custody dispute with petitioner), *rev'd in part sub nom* *Kiarelddeen v. Ashcroft*, 273 F.3d 542 (3rd Cir. 2001) (ruling that the government was “substantially justified” in its prosecution and reversing grant of attorney's fees only); Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 83-90 & nn.186-87 (1999) (describing submission of mistranslated documents, erroneous classifications, and agency bias in secret evidence cases).

Apart from these underlying concerns and arguments, indefinitely detaining anyone without due process—terrorist suspects, possible saboteurs, or criminal suspects of a more traditional type (and terrorism is a crime, too)—is a violation of the laws of war. Major General Archer Lerch wrote in 1945 about the First (1929) Geneva Convention: “The Geneva Convention, I might emphasize is *law*. Until that law is changed by competent authority, the War Department is bound to follow it.”<sup>277</sup>

The war on terror is a war that British Government officials predict may last fifty years.<sup>278</sup> Do we propose perpetually shelving all the international humanitarian laws, the laws of war, and the Nuremberg Charter in order to prosecute this war? Many of these principles were developed as a result of wars.

The problem also is that, having previously erected a system of indefinite detention and interrogation for civilian security suspects, we have created and legitimized a dangerous practice and have made it a normal part of our culture.

#### VIII. HOW DID WE GET HERE?

Although Vietnam may be and often is seen as a shameful episode in our history, it is clear that we are now repeating that history. Yale Law Professor Harold H. Koh wrote in 1990 about the Iran-Contra Affair:

If the Iran-contra committees had looked past Watergate to the Vietnam era, they would have seen that the Iran-contra affair was only the tip of a much larger iceberg that crystallized during the Vietnam War. All of the congressional-executive struggles that surrounded the affair merely replicated battles that transpired during that earlier period. That history should have repeated itself across so many spheres of foreign affairs, even after Congress has passed so many statutes to avoid repetition of the Vietnam-era evasions, suggests that the Iran-contra affair exposed systemic, rather than localized, problems in the American foreign-policy process.<sup>279</sup>

According to Koh, executive seizure of the initiative in foreign affairs can be said to arise from the fact that under our Constitution, the president may more easily do so than may Congress. Koh notes that, beginning with President Franklin Roosevelt’s initiation of “extrovert” foreign policy,

<sup>277</sup> Archer Lerch, *The Army Reports on POWs*, AM. MERCURY, May, 1945, at 536-47, available at <http://lawofwar.org/Protected%20Persons.htm>.

<sup>278</sup> *War on Terror “May Last 50 Years*, BBC NEWS, Oct. 27, 2001, <http://news.bbc.co.uk/1/hi/uk/1623036.stm>.

<sup>279</sup> HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 62 (1990).

"[a]n entire generation of Americans grew up and came to power believing in the wisdom of the muscular presidential leadership of foreign policy."<sup>280</sup>

"Yet," Koh notes, "Vietnam caused an entire generation to rethink its attitude toward foreign policy. National elites became less willing to intervene to defend other nations and to bear the costs of world leadership."<sup>281</sup> "Why, then, have presidential initiatives not only continued, but appeared to accelerate, during the post-Vietnam era?"<sup>282</sup> Koh believes that "America's declining role as world hegemon has forced changes in the postwar structure of international institutions, which have in turn stimulated further presidential initiatives."<sup>283</sup>

A shift has also taken place in the public mind. "The rise of new and unanticipated problems not subject to the control of any nation-state, such as global terrorism and the debt crisis, have increasingly forced the United States into a reactive international posture. Given the president's superior institutional capacity to initiate governmental action, the burden of generating reactive responses to external challenges has almost invariably fallen on him."<sup>284</sup> According to Koh, "[t]he same public opinion that has empowered the plebiscitary president has simultaneously subjected him to almost irresistible pressures to act quickly in times of real or imagined crisis."<sup>285</sup> Koh attributed what he saw in 1990 as "the recent wave of treaty breaking and bending" as a reflection of a "reactive presidential role in leading both America's flight from international organizations and its movement toward alternative mechanisms of multilateral cooperation."<sup>286</sup>

Koh cites "President Reagan's use of short-term military strikes and emergency economic powers (to respond to terrorism); longer-term military commitments in Lebanon and the Persian Gulf (to respond to requests for peacekeeping); arms sales (to respond to military tensions in the Middle East); and covert actions (to effectuate neo-containment policies in Central America and Angola) [as reflections of] the modern American perception that crisis situations uniquely demand a presidential response."<sup>287</sup>

Whatever the reasons for "presidential initiative," it is clear that such initiative is at the bottom of the abuses found behind the present detentions of combatants. It is clear that, whether or not we should require presidents rather than Congress to be responsible for creating and carrying out

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<sup>280</sup> *Id.* at 119.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 120.

<sup>284</sup> *Id.* at 121.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 122.

foreign policy, the President now *is* responsible for those things and thus cannot claim both to lead the nation and simultaneously evade responsibility for the egregious acts of subordinates who follow his policies. Having issued orders that intentionally evade and violate the central international laws relating to detention and status determination of belligerents, having sanctioned indefinite detentions and interrogations that violate those same laws, which ultimately led to torture and murder committed by soldiers and military intelligence personnel, the President and his advisers are ultimately responsible for the consequences of those violations. They may not evade such responsibility merely by stating that laws do not apply, or as Charles B. Gittings of the Project to Enforce the Geneva Conventions put it recently in an *amicus curiae* brief in the Guantanamo Bay Detainee Cases, they may not “commit war crimes with impunity [simply] because they are responsible for enforcing the laws.”<sup>288</sup>

We have reached a critical point in our history, a point which has ramifications as far-reaching as the Civil War or World War II. Since the WWII, the United States has evolved to the point where it is the sole super power on earth. No nation has its economic or military might. But if we are to lead the world into the 21st Century, we must also establish our unchallenged moral authority. This is the job of the President, and as Commander in Chief, he must set a standard in fighting the War on Terror that rises above the moral ambiguities and potential for human rights abuses that are embedded in the policy of administrative detentions. For the sake of our national soul, we must find a better way.

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<sup>288</sup> Brief for Charles B. Gittings, Jr., as Amici Curiae Supporting Petitioners at 10, *In re* Guantanamo Detainee Cases, 355 F.Supp.2d 482 (D.D.C. 2005) (No. 02-0299, No. 02-0828, No. 02-1130, No. 04-1135, No. 04-1136, No. 04-1137, No. 04-1142, No. 04-1144, No. 04-1164, No. 04-1166, No. 04-1194, No. 04-1227, and No. 04-1254), available at [http://pegc.no-ip.info/archive/DC\\_Gitmo\\_Cases\\_JHG/CBG\\_gitmo\\_amicus\\_20041012.pdf](http://pegc.no-ip.info/archive/DC_Gitmo_Cases_JHG/CBG_gitmo_amicus_20041012.pdf).



## APPENDIX A

## NOTE ON INTERNATIONAL HUMAN RIGHTS PRINCIPLES ADOPTED IN THIS ARTICLE

We are aware that legal arguments concerning due process, trial and legal counsel rights, detention and treatment vary depending upon the situation and that lawyers on both sides of these arguments distinguish combatants from noncombatants, lawful or unlawful, citizens or aliens, found in the U.S. or abroad, POW's under the meaning of Geneva or some other category, and so on. *See* Elsea, *Detention of American Citizens*, *supra* note 29.

Our position, however, adopts a broader brush that does not require such distinctions, relying instead on internationally recognized basic human rights of due process, fair trials, and freedom from torture or inhumane treatment. For foundational principles, we refer readers to the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N.Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

The following is an excerpt from the Preamble to the UDHR:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

....

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Specific provisions of the UDHR that we feel are significant in the context of administrative detentions are, for example:

(Art. 5) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

(Art. 8) Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law; (Art. 9) No one shall be subjected to arbitrary arrest, detention or exile; and

(Art. 11(1)) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

## APPENDIX B

## LISTING PERSONS SUBJECT TO SECTION 412 CERTIFICATION

USAPA § 411(a), codified at 8 U.S.C. § 1182(a)(3) (amending INA § 212(a)(3))

Section 412(a) amends Section 236A of INA. Subsection (3) CERTIFICATION, reads:

The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--

- (A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or
- (B) is engaged in any other activity that endangers the national security of the United States.

The provisions listed under (A) read as follows:

Section 212 of INA provides standards for excludability of certain aliens. The provisions applying to Section 412 certification are:

212(a)(3)(A)(i)—any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting export from the United States of goods, technology, or sensitive information

212(a)(3)(A)(iii)—any activity a purpose of which is the opposition to, or control or overthrow of, the Government of the United States by force, violence, or other unlawful means.

212(a)(3)(B)—Terrorist activities

(i) In general Any alien who—

(I) has engaged in a terrorist activity,

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv)),

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity,

(IV) is a representative (as defined in clause (v)) of—

(aa) a foreign terrorist organization, as designated by the Secretary of State under section 1189 of this title, or

(bb) a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities,

(V) is a member of a foreign terrorist organization, as designated by the Secretary under section 1189 of this title, or which the alien knows or should have known is a terrorist organization [1]

(VI) has used the alien's position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support

terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities, or

(VII) is the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

Section 237 INA provides for removal of certain aliens.

237(a)(4)(A)(i), 237(a)(4)(A)(iii), and 237(a)(4)(B)—are otherwise identical to the 212 sections.

## APPENDIX C

RESOLUTION OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW  
(MARCH 30, 2006)

The American Society of International Law, at its centennial annual meeting in Washington, DC, on March 30, 2006, Resolves:

1. Resort to armed force is governed by the Charter of the United Nations and other international law (*jus ad bellum*).
2. Conduct of armed conflict and occupation is governed by the Geneva Conventions of August 12, 1949, and other international law (*jus in bello*).
3. Torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state are prohibited by international law from which no derogations are permitted.
4. Prolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law.
5. Standards of international law regarding treatment of persons extend to all branches of national governments, to their agents, and to all combatant forces.
6. In some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates.
7. All states should maintain security and liberty in a manner consistent with their international law obligations.